OIL AND GAS CONTRACTS: A LAW IN CONTEXT ANALYSIS USING NIGERIA AS A CASE STUDY

JAMIU OLOHUNDARE ADEBAYO, LLB (Hons), LPC, LLM.

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ABSTRACT

The legal and regulatory framework of the oil and gas industry and the contracting obligations arising thereof have evolved over time in many forms across oil producing states. Given the peculiarities of each of these oil producing states, the framework is constantly changing. The changing face of politics, climate and rapidly developing technology are changing the landscape of the industry, demanding a fundamental need for petroleum resource-endowed states to take a strategic view and choose what legal framework and contracting approaches are likely to deliver their ultimate objective: optimum production with topmost financial gains. The idea behind the exploration and exploitation of natural resources is to attract foreign direct investment (FDI) into developing states with the anticipation that such investment will put them on the centre stage of global economics and lead to an improvement in research and technology transfer that would sustain economic growth and development. However, the objective of transnational corporations is to maximise their profits. Ultimately, it is the exploration licensing contracts that states use to implement oil exploration and exploitation policies. The present research therefore seeks to look at the dynamics of the legal and regulatory framework of the oil and gas industry focussing on its everchanging contract types and nature.

The research attempts to look at the causes of the imbalance in international oil and gas contracts with an eye on the observation that one of the causes of the imbalance are the investment treaties because they focus on a state's obligations with little or no focus on obligations from transnational corporations towards the states. Some critical clauses that need to be taken into account by parties to the contract are also explored because it is argued that contractual clauses are also among the causes of imbalance in international oil and gas contracts. This research therefore addresses the causes of imbalance by looking at the problems associated with investment treaties and the long-term contractual relationship between the host states and the transnational corporations, particularly the associated risks with oil and gas contracts such as; political, economic, natural and technical risks. Essentially, the study will narrow down on the processes, technicalities, case studies and the features of four main types of oil and gas contracts namely, Production Sharing Agreement, Joint Ventures, Service Contracts and the two Concessions, (Old and New). The research also attempted to answer the following questions: what is the current structure of oil contracts and to what extent can parties' commitments be altered to ensure the sustenance of economic stability? Which type of contract is the best for development and financial purposes? What are the causes of imbalance in the oil contract and to what extent have the principles of international environmental law been utilised at a state level and whether developing countries have been able to overcome the pressures from transnational corporations on the issue of environmental law? The research will address these questions through its five chapters.

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ABBREVIATIONS

Arbitration and Conciliation Act……………………………………………ACA

Ashland Oil Nigeria Co…………………………………………………… AON

Bilateral Investment Treaties………………………………………………. BITS

British Petroleum……………………………………………………………BP

Charter of Economic Rights and Duties of States……………………………. CERDS

Chevron Nigeria Limited……………………………………………………CNL

Commerce and Consular Relations Treaties……………………………………FCCRS

Commerce and Navigation Treaties……………………………………………FCNS

Common Investment Area…………………………………………………...CIA

Companies and Allied Matters Act 1990……………………………………… CAMA

United Nations Conference on Trade and Development…..……………………UNCTAD

Corporate Social Responsibility………………………………………………CSR

Elf Petroleum Nigeria Limited………………………………………………. EPNL

Environmental Impact Assessment……………………………………………EIA

Environmentally Sound Technology…………………………………………. EST

ExxonMobil Canada Ltd……………………………………………………… EMCL

Federal Inland Revenue Service……………………………………………… FIRS

Foreign Direct Investment…………………………………………………… FDI

Imperial Oil Resources Ventures Limited………………………………………. IORVL

International Centre for Settlement of Investment Disputes……………………. ICSID

International Court of Justice………………………………………………… ICJ

International Labour Organisation…………………………………………… ILO

International Oil Companies…………………………………………………. IOC

Investment Promotion and Protection Agreements…………………………...IPPAS

Investment Treaty Arbitration………………………………………………... ITA

Investor-State Dispute Settlement……………………………………………. ISDS

Joint Operating Agreement…………………………………………………… JOA

Joint Venture…………………………………………………………………. JV

Local Content………………………………………………………………. …LC

Memorandum of Understanding……………………………………………. . MOU

Multilateral Investment Guarantee Agency………………………………….. MIGA

Multinational Oil Companies………………………………………. …..…. MOC

Mobil Production Nigeria Unlimited…………………………….……….. …… MPNU

National Contact Points…………………………………….……….……... NCP

New International Economic Order…………………………………. … NIEO

Nigerian Agip Oil Company Limited………………………..………………. . NAOC

Nigeria National Petroleum Corporation……………..…………….………… NNPC

Non-Governmental Organisations…………………………….……………… NGOS

North American Free Trade Agreement…………………………………………. NAFTA

Organisation for Economic Co-operation and Development……………………. OECD

Organisation of the Petroleum Exporting Countries……………….…………. OPEC

Permanent Sovereignty over Natural Resources…………………………………. PSNR

Permanent Court of International Justice ……………………………………. …. PCIJ

Philippine International Air Terminals Co……………………………….......PIATCO

Production Sharing Agreement………………………………………….. .…… PSA

Regional Centre for International Commercial Arbitration Lagos……………. … RCICAL

Shell Petroleum Development Company of Nigeria Limited……………………. SPDC

Texaco Overseas Petroleum Company of Nigeria Unlimited……………………. TOPCON

Trade – Related Aspects of Intellectual Property Rights……………………….……TRIPPS

Transnational Corporations………………………………………………………. TNCS

Turkish Petroleum Company…………………………………………. ………. TPC

United Nations Commission on the International Trade Law…………………. UNCITRAL

United Nations Conference on Law of the Sea………………………………. …. UNCLOS

United Nations General Assembly……………………………………….…………. UNGA

United Nations Guiding Principles on Business and Human Rights……………. UNGPS

INTRODUCTION

It is established that a failure to adopt the right type of petroleum contract by the host states may cause serious challenges and exploitation. In seeking to provide a guide therefore, this research examines and analyses types of petroleum contracts with a focus on the main elements and the way they are drafted and interpreted in different jurisdictions.

The academic researchers have concluded that there are four main types of exploration and exploitation contracts namely and in summary, old and modern concession, joint ventures, service contract and production sharing agreement (PSA).[1] Therefore, it is pertinent to look at their definitions as given in literature. Spalding and King define petroleum contracts as a system by which the host state grants the petroleum company the exclusive rights to explore and produce hydrocarbons in an allocated areas of land for a certain time, in an exchange for payment of taxes and royalty.[2] As mentioned earlier that there are two types of oil and gas concession agreements, the traditional concession agreement and modern concession agreement. The traditional concession grants transnational corporations exclusive license to explore and export oil for a long period.[3] These aspects of the agreements were regarded as

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[1] Hossain K. Law and policy in Petroleum Development: Changing Relations Between Transnational and Government. New York & London: Nichols Publishing Company (1979), Waelde T. W. &Beredjick, N, Petroleum Investment policies In Development Countries. London, United Kingdom (1988) Johnston, D. International Petroleum Fiscal System and Production Sharing Contracts, (1994) Taverne, B. G. Petroleum Industry Governments: A Global Study of the Involvement of Industry and Government in the Production and Use of Petroleum, Kluwer Law International, (2008), Machmud, T. N. The Indonesian Production Sharing Contract: An investor's perspective, Kluwer Law International (2000).

[2] King & Spalding LLP; 'An Introduction to Upstream Government Petroleum Contracts: Their Evolution and Current Use' (2005) 1 OGEL. Available at <https://www.ogel.org/article.asp?key=1730> accessed 5 August 2015.

[3] Various contracts were concluded under the old concession and transnational corporations were given 75 years or more to explore and exploit mineral resources. Some were granted exclusive rights to explore the entire country in exchange for royalty payments which were considered little by comparison with the oil companies' benefits and gain. Chapter 3 of the thesis explores this and cites so many other examples from different jurisdictions.

unbalanced owing to their lengthy duration and the large areas in which the agreements covered. However, the new concession emerged when it became apparent that the old concession was unfavourable to the interests of the host state. The modern concession agreement grants exclusive rights to the transnational corporations to explore, extract, produce and market the natural resources in a specified area for a fixed period. The identified problems with old concessions have been rectified in the new concessions. The transnational corporations cannot expect to be granted an exclusive licence to explore over an entire country and they are no longer permitted to cover large geographical location during exploration activities. Above all, the long period that was previously allowed is reduced to reasonable period.[4]A joint venture is another type of petroleum agreement. Under the joint ventures, the national oil company partners with transnational corporations to explore, extract, produce and market natural resources through a joint operating agreement (JOA). In Nigeria, the joint ventures arrangement means joint ownership of license, joint funding obligations, shared capital and reward but risk and liability are split including tax liabilities.[5] In addition, service contract is also a petroleum contract which Denis defines as a contract by which a contractor international oil company (IOC) undertakes to explore for hydrocarbons at his own risk and expense on behalf of a national oil company (NOC), and by which he is reimbursed and remunerated in cash depending on the success of the exploration.[6] Therefore, a service contract is a type of petroleum agreement whereby transnational corporations are required to explore oil and gas

[4] Article 4 (a) of Petroleum Working Contract Between Indonesia and P.T. Stanvac Indonesia, 1964 is examined contact is examined in Chapter 3 and it reveals that oil company was given 6 months to start exploration activities and maximum of 8 years to conclude other related exploration matters. Similarly, the transnational corporations were given 12 years in total for exploration activities.

[5] Chapter 3 examines Nigerian's joint ventures in depth and highlights the disadvantages of this type of contract for developing country. The chapter further points out why Nigeria has decided to switch from joint ventures to production sharing agreement.

[6] Guirauden Denis, *Legal, Fiscal and contractual frame work, oil and gas exploration and production; reserves, costs and contracts*, (3rd edition, 2004) 170.

fields on behalf of host state in return for prearranged payment with no control over the produced oil and with no profit sharing option. Consequently, production sharing agreements (PSA) were defined in Brazilian's Bill of Law as a "regime of exploration and production of oil, natural gas and other fluid hydrocarbons whereby oil companies will be granted rights to explore for develop and produce petroleum reserves, at their cost. In the event of a commercial discovery, costs incurred will be reimbursed to oil companies through an entitlement to production referred to as "cost oil". The remaining petroleum, after deduction of cost oil, is considered "profit oil".[7] It is observed from the PSA's definition that it grants transnational corporations the exclusive rights to explore and produce oil with a unique significant distinction among other types of petroleum contracts mentioned so far. It is based on a sharing formula where the profit of oil and gas will be shared according to the agreed proportion between the host state and the transnational corporations. In view of the various contract types and their definitions, this research acknowledges that the host states need to take a strategic view and choose the best out of the four highlighted, the contract type which is likely to deliver the country's ultimate objective, optimum production with topmost financial gains and Nigeria will be used as a case study for the research.

The challenges facing the industry are quite enormous particularly those arising from the nature and obligations of the types of petroleum contracts outlined above and the varied perceptions by stakeholders. In Nigeria for example, the government was severely criticised over a Production Sharing Agreement it signed with Ashland Oil and the furore it generated led to a public inquiry because it was argued that the contract failed to maximise returns for Nigeria and was therefore susceptible to exploitation against the interest of Nigeria. The investment in the oil industry has over the years been regarded as a source of economic development,

[7] Bill of law (Projeto Lei) 5938-09.

particularly in Africa where it has been the key element of globalisation and a source of employment, technological progress, productivity improvements and importantly economic growth.[8]

Exploration licensing contracts are what states use to implement oil and gas exploration policies and some of the producing states that depend heavily on oil revenue are likely to face exploitation from transnational corporations if they fail to adopt the right type of petroleum contracts. In addition, most of the notable challenges facing the oil producing states, including Nigeria are caused by the nature and obligations of petroleum contracts. It is not disputed that states owned the hydrocarbon resources and they delegate the task of exploration and exploitation to transnational corporations that have the financial resources and expertise to embark on the exploration project. However, the exploration project will be governed by certain types of contracts and efforts to justify the best types of oil contracts have led to controversial debates and generated various inputs from academic writers. Accordingly, some of the features of petroleum agreements will be thoroughly examined by this research. It is important to point out that there is no material on gas therefore this research is solely based on oil contracts. Additionally, new types of energy became popular after commencement of this research and they are not considered.

The issues of granting exploration licence to transnational corporations to explore oil for a long period is regarded as a key problem under the Old Concession and was eventually changed under the New Concession which resolved the concerns of large geographical location associated with the Old Concession.

[8]Chisa Onyejekwe, ‘Legal uncertainties and foreign direct investment: a case study of Nigeria’ (2018) International Company and commercial Law Review 125.

The Joint Venture is another type of oil contract and was initially regarded as the best option owing to the greater advantages it accorded the host state to control oil exploration activities. Evidence from the cases analysed in this research have suggested that the lack of funding by the host states due to imbalance in financial capacity among partners is seen as a major challenge which has prompted the host states, particularly from developing countries to explore other options such as Service Contracts and Production Sharing Agreements. However, the Service Contract was labelled as economically inefficient and prone to potential loss.[9] On the other hand, the lack of financial burden for the host states before, during and after exploration and exploitation activities have been regarded as one of the advantages under the Production Sharing Agreement. Besides, Michael added that Production Sharing Agreement emerged from the adoption of the UN Resolution 1803 and 3281 and paved the way for oil producing states and their national oil companies to participate in exploration and exploitation activities.[10] This can be justified because the UN Resolutions (1962) provided for the sovereign rights over natural resources and for the resources to be effectively used for the development of their countries.[11] Nevertheless, findings from the Production Sharing Agreement revealed that the oil contract comes with certain risks and are only suitable for transnational corporations that are willing to take risks associated with exploration and exploitation activities under this type of contract. The experience in Brazil is a graphic illustration of how the adoption of certain types of petroleum contract can pose a serious challenge particularly from stakeholders. The

[9] Smith E.E. and others, *International Petroleum Transactions*, (2nd edn 2000) 512.

[10] Miceal Likosky, *Contracting and regulatory issues in the oil and gas and metallic minerals industries, Transnational Corporations*, VOL. 18 No. 1 (April 2009) 12.

[11] Permanent Soverign over Natural Resources General Assembly resolution 1803(XVII) 1962.

Brazilian government signed Production Sharing Agreements in November 2013[12] with the hope of meeting the nation's ambitious development strategy, including boosting its ship-building and other energy related sectors. However, the contract has drawn protests from the nation's oil workers whose union has long been opposed to any foreign involvement in Brazil. They argue that it will slow down investments and have negative effects on the development of the oil sector. But supporters of the deal say the contract is necessary to attract necessary capital and technical expertise required to tap into the challenging deep water-field. They opposed the old concession under which, they argued, international oil companies-controlled government revenue by regulating production, which placed severe constraints on national sovereignty and its control over state resources and wealth.[13]

Despite the above, there is a dearth of research work and literature focusing specifically on oil and gas contracts. Accordingly, this research aims to narrow this gap by looking at the dynamics of the legal and regulatory framework of the oil and gas industry and the ever changing contract types and nature, especially in developing countries. Thus, this research explores all the four types[14] of oil and gas contracts and the elements of these contracts with the way they are drafted and interpreted in different jurisdictions while focusing on the Nigerian context to analyse the features, advantages and disadvantages of each type of contract. The study further examines the critical clauses that need to be taken into account by parties to the contract with a view to providing answers to some of the fundamental questions imperative to improving revenue generation to oil producing countries. This study also exposes many of

[12]Brazil's Libra PSA- First anniversary, 'Special Report: Energy & Natural Recourses Sector' (Financial World Magazine, November 2014) <https://www.financialworldwide.com/brazils-libra-psa-first-annivasary#.XBUFzxLGUK> accessed on 18 January 2018.

[13] Brazil's Libra PSA- First anniversary (n 12).

[14] The concession contract, the joint venture contract, the service contract and the production sharing contract.

the complexities and issues that States struggle with in formulating contracting policies. Essentially, a petroleum contract is simply one part of the overall petroleum regime that governs petroleum resources. Others are; Bilateral Investment Treaties (BITs), the Constitution, Regulation and Petroleum Laws. Petroleum contracts are structured to contemplate the entire life span of a project; its beginning, middle and end.

Hypotheses

The current research is titled, **'OIL AND GAS CONTRACTS: A LAW IN CONTEXT ANALYSIS USING NIGERIA AS A CASE STUDY'**. This research intends to provide answers to the following research questions:

1. What is the current structure of oil contracts and to what extent can parties' commitment be altered to ensure the sustenance of economic stability?
2. Which contract type is the best for development and financial purposes?
3. What are the causes of imbalance in the oil contract and to what extent have the principles of international environmental law been utilised at a state level and whether developing countries have been able to overcome the pressures from transnational corporations on the issue of environmental law?

Providing answers to the questions above will in turn, lead to a number of other issues which will be dealt with by each chapter of the research as outlined below:

Chapter 1: The Current Structure of International Oil Contracts

Chapter 2: Duties of Transnational Corporations and How a Balance May Be Struck

Chapter 3: Some Certain Features of Oil Contracts

Chapter 4: The Causes of Imbalance in International Oil Contracts

Chapter 5: A Critical Analysis of International Environmental Laws and their Application by Host States.

Chapter 1 examines various bilateral treaties involving the transnational corporations and the host states towards understanding the operating mechanisms and current structure of international oil and gas contracts. It examines critically both sides of the arguments for and against the current form and structure of BITs. It is observed that treaties have been mostly in favour of the transnational corporations and evidence established that BITs are primarily to protect foreign investors and their investments by addressing obligations of a state towards transnational corporations, but none or very few obligations of the transnational corporations towards the states; and this unbalanced relationship is perceived as a deficiency of the investment regime.[15] Investment treaties are recognised around the world as mechanisms to increase investments and prosperity in host states and to promote economic relations. However, this chapter argues that one of the treaties' features makes it impossible for the host state to hear domestic claims arising from exploration activities because it allows the transnational corporations to bring claims before international tribunals owing to the dispute resolution mechanisms in the treaties. The review of the literature in this area has revealed that "the central aim of BITs is to protect foreign investors and their investment."[16] Many States have shown their dissatisfaction over the fact that submission of disputes to investment arbitration curtails their sovereignty and it could not be concluded that the sovereign choice of the state when signing investment treaty to gain the rights of business has priority over a subsequent choice of the state to secure the right of people. On this point, Valentina added that "it seems that the regime established according to investment treaties does not strike the right balance

[15] Xemena Herrera-Bernal, 'Arbitral Jurisprudence; the arbitrator's concerns about treating the parties equally and taking into account the needs of the state/or concession authority' (2013) International Business Law Journal 1.

[16] Bernhard Maier, 'How has international law dealt with the tension between sovereignty over natural resources and investor interests in the energy sector? Is there a balance?' (2010) International Energy Law Review 7.

between the parties concerned."[17] The chapter aims at providing a review of a number of oil related arbitral cases in which the question of expropriation was raised because some investors argued that the host state law constituted a vehicle to expel them from the host country as analysed in ***Occidental v Ecuador***[18] where the tribunal found that Ecuador's measures were 'tantamount to expropriation.' [19] In addition, Chapter 1 seeks to draw out a balanced assessment on BITs from works of research that have examined some notable matters relating to investment treaties and identified the lack of treaty provisions that can ensure a symmetric investment protection. Going further, it discusses how developing countries are facing difficulties in amending and renegotiating bilateral investment treaties. The chapter shows that developed countries have enhanced documented transparency in investment treaties in order to safeguard their regulatory powers and points out that most of the treaties signed by countries such as the US, Canada, and Australia contain general exception clauses which allowed reasons for justifying regulatory measures.[20] The chapter later explained how a balance may be struck through the harmonisation of contending interests between host states and transnational corporations.

Chapter 2 of the research covers salient matters arising from the focal points raised in chapter 1. It focuses on how the right balance may be struck by examining the international mechanisms regulating the activities and conducts of transnational corporations. The host states and the transnational corporations have different objectives according to Mato.[21]The host states in one

[17] Valentina Sara Vadi, 'Cultural Heritage and international investment law: a stormy relationship' (2008) International Journal of Cultural Property 1.

[18] ICISD Case No. ARB/06/11, Award October 5 2012.

[19] *Occidental* (n 18).

[20] US 2004 Model BIT, Canada 2004 Model BIT and Australia- Singapore Free Trade Agreement.

[21] HT Mato, *the Role of stability and Renegotiation in Transnational petroleum Agreement*, (2012) at 308.

hand aspire to promote their economic growth while the transnational corporations on the other hand want to maximise their profits [22] In order to evaluate these postulations, Chapter 2 examines the UN Resolution (1962) which provides the rights of all states to freely dispose of their natural resources and wealth in accordance with national interest. The chapter highlights the importance of UN Resolution (1962) because the special features of oil and gas contracts are found under its provisions which have enabled developing countries to rise up to the challenges of transnational corporations. Its provisions have challenged international economic law and the unbalanced relationship between the developed and developing countries. In addition, an in-depth examination of the Charter of Economic Rights and Duties of State 1974 (CERDS) in this chapter is intended to identify how the host states could regulate foreign investments in accordance with its local law and national priorities. CERDS addressed the needs and aspirations of developing states by allowing them to create laws that will ensure transnational corporations operate under the local law. However, some of the CERDS provisions were considered by developed states as one-sided, particularly the provision which stipulates that every state has the right to expropriate foreign investment.[23] Amongst others, the chapter further examines UNCLOS III (1982) which defines the rights and obligations of member states with regards to the Oceans. It provides for business activities and sets out guidelines for transnational corporations. It also stipulates direct and specific obligations for transnational corporations. The chapter discusses all of these including international mechanisms which regulate the activities of transnational corporations as well as international legal personality of transnational corporations which has raised a longstanding and complex debate.

[22] HT Mato (n 21).

[23] Art 2(2) (c) of the CERDS 1974.

Chapter 3 of this research is intended to analyse the features of oil and gas contracts as the general theme of the research in order to find out which contract type is the best for development and financial purposes. The chapter examines the four types of oil contracts, their features, advantages, disadvantages and several factors to be considered by the host states before adopting these exploration agreements. The findings from this chapter is also expected to shed some lights on the underlying problems of each contract types that have prompted the host states to shift from one contract type to the other. For example, the PSA was first used in Indonesia in 1966 when the classic concession was less favourable and was replaced to enable the government exercise control over its oil. Similarly, Nigeria concluded PSA 1973 while the government established the Nigerian National Petroleum Corporation (NNPC) in 1977 and signed NNPC/Shell 1 joint venture 1984, shifted to Production Sharing Contracts in 1993, opted for Service Contract in 2000 and concluded new PSCs in the downstream oil sector in 2002.[24] In the same vein, Brazil has adopted three contracts model over the years. The Service Contract was adopted by Brazil in 1975 and later changed into the concession regime in 1979, the country is currently utilising the PSA. The chapter investigates the rationale behind the shifting as Bindermann posits that the main reason for host state adopting a PSA was premised on nationalism and government ownership of the host state's natural resources[25] and Al-Attar and Almoair claimed that a PSA is the right option for host states, particularly, where reserves were large with medium exploration costs.[26] In addition, the method of granting exploration licence has changed since the Old Concession era with the Middle East mainly associated with

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[24] NNPC, 'History of the Nigeria Petroleum Industry' <http://nnpcgroup.com/NNPCBusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx> accessed 12 January 2018.

[25] Kirsten Bindemann, *Production Sharing Agreements: An Economic Analysis,* Oxford Institute for Energy Studies (1999) 5.

[26] A Al- Attar and O Alomair," Evaluation of Upstream Petroleum Agreements and Exploration and production costs" OPEC Energy Review, Organisation of the Petroleum Exporting Countries (2005) at

concession types. Justification for the shifting from old concession to the new one has been classed into four categories. Firstly, the exclusive rights granted to the transnational corporations to explore and exploit the oil covered wide geographical areas and sometimes the whole country. Secondly, the concessions were signed for long duration. Thirdly, the transnational corporations were in the control of exploration and exploitation activities and lastly, there was no requirement within the old concession to produce oil, the transnational corporations decide in accordance with the oil market price. Thus, the new concessions were adopted to change some of the less favourable terms within the old concessions. Under the modern concessions, the host state can get better value for its exploration projects. This chapter explores all of these in order to address important issues surrounding the oil contracts and to illustrate how they have developed. Consequently, the findings from this chapter will suggest which oil contract is more favourable for development and financial purposes.

The petroleum contracts' concept was developed in international investment law to protect the interest of host states and transnational corporations and on this point chapter 4 will address the causes of imbalance in oil contracts by examining the long-term contractual relationship, and the associated risks including political, economic, natural and technical risks. The chapter will analyse these risks which could not be practically avoided but can be transferred or be spread through risk management methods. In order to evaluate these hypotheses, the chapter analyses some of the important clauses in petroleum contracts together with the risks inherent in exploration projects. This chapter answers one of the research questions: What are the causes of imbalance in the oil and gas contract and what terms and conditions are usually incorporated into petroleum contracts with a view to preventing or minimising the pollution level in a country by transnational corporations?

This chapter argues that the clauses in oil and gas contracts can put the host state in a situation whereby it could be deprived of excising its fundamental rights as a sovereign state. However, findings from this chapter will show that the host states among developing countries are unilaterally taking measures which affect the rights of transnational corporations and thereby reducing the value of their investment and therefore a right balance needs to be struck. Exploration agreements are anticipated to last long which makes it important that such contracts are stable, predictable and profitable. Additionally, the host states and the transnational corporations are aware of the nature of likely risks and it may be possible to foresee the likely events which may make performance impossible. The parties can manage inherent risks in exploration projects through the clauses of their contracts by inclusion of standard clauses for example, stabilisation, renegotiation, force majeure, arbitration and governing law clauses. This chapter will provide a detailed review of these clauses.

Arbitration clauses will be addressed in detail, inter alia, with the development of the Nigerian courts' principles in this area. Nigeria is among the contracting members around the world that have favoured arbitration to settle investment disputes and enacted many laws to promote arbitration, particularly for the settlement of disputes in the oil industry. The binding effect of arbitration clauses are carefully considered with information that highlights certain disputes that are excluded from arbitration in Nigeria. A critical analysis of these clauses is intended to identify how the parties to petroleum agreements could avoid imbalance in their respective agreements and how they could come up with effective clauses that will ensure the rights and obligations of the parties are fulfilled. The findings from this chapter can also be used as a primary reference for understanding the causes of imbalance in petroleum agreements.

Chapter 5 seeks to discover international environmental laws which have been developed to safeguard the environment in relation to oil exploration activities and their application by the host states. The numbers of incidents on environmental issues as a result of oil exploration and production activities have established that transnational corporations are responsible for some of the major environmental problems and disasters. A good example is the 1989 disaster of

Exxon Valdez off the Alaskan Coast, where crude oil contaminated around 1,300 miles of coastline and affected marine life, local people and fishing activities.[27] There is also the Deepwater Horizon disaster, a major historical mark in the Gulf of Mexico. The incident which resulted in a massive oil leak after the explosion of oil rig led to sever contamination and had adverse effect on local communities and fishing activities. [28] Similarly, in Nigeria, there was also an oil spill incident in Akwa Ibom State in which ExxonMobil's pipeline was reportedly ruptured and spilled about a million gallons of crude oil. However, environmental problems are not limited to oil spillage. It includes air pollution, chemical accidents and hazardous materials, gas flaring, global warming and acid rain, just to name a few. Some of these identified incidents occurred as a direct result of human activities and can be managed if not completely eradicated. **Chapter 5** therefore investigates the major principles of international environmental laws and the way they are applied at a national level to ultimately protect the environment. Part of the chapter examines the relevant paragraph of UNCLOS III (1982), which takes care of exploration and the host state responsibilities. The chapter further discusses internal and external challenges faced by the host states, particularly, the implementation of principles of international environmental law. It is maintained that the host state's involvement in certain types of oil contracts specifically, joint ventures, has hindered the implementation of local law on environmental issues. Thus, the chapter seeks to identify why the victims of oil pollution are, in some cases left without any remedy despite the emergence of environmental liability legislation. The grievances of innocent victims of oil sabotage which resulted in oil-spillage and pollution in Delta region of Nigeria are not being carefully considered. It, therefore, starts with a case by case examination of related Nigerian environmental laws to

[27] BBC Report, published on this day 1950-2005 <http://www.news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid4231000/4231971.stm> accessed 4 October 2017.

[28] UNEP, (2014), 'Environmental management in oil and gas exploration and production', <http://www.ogp.org.uk/pubs/254.pdf> 14 accessed 4 October 2017.

discover the legal basis upon which transnational corporations could not be held liable for environmental pollutions. To reach its goals, the chapter analyses the following environmental legislation; the Associated Gas Re-injection Act and Regulations 1979, the Associated Gas Re-injection Act 2004, Management Act on Environmental Draft 2000, the Oil Pipeline Act 1956, Petroleum and Distribution (Anti Sabotage) Act 1975, Petroleum Drilling and Production Regulation 1969, the Oil Navigable Waters Act 1968, and the Prevention of Oil Pollution Act 1971. The academic writers' views on this issue are also critically analysed to highlight the assertion that the primary motive behind some of the aforementioned laws was the protection of transnational corporations' interest and that the interests of innocent victims of oil pollution were a secondary objective. The chapter further sheds some lights on enforcement rights for the local people and consider whether the victims of the Delta region could have obtained a fair judgement they deserved if liability for pollution is regulated by a global treaty. The chapter also analyses the likely impact of public awareness on environmental laws and policies because a lack of public awareness and lack of governmental initiative are regarded as the key factors which made environmental laws ineffective. The chapter thereafter offered suggestions for better access to environmental information.

Methodology

In relation to the importance of research methodologies, Morris and Murphy posit that "there is no one right methodology or perfect methodology and you may find that your work incorporates one or more methodologies depending on the nature and needs of your research."[29] Chatterjee's view on research design cannot be overlooked. He posits that 'Research design is concerned with the structure, plan and method(s) of investigation with a view to reaching

[29] Caroline Morris and Cian Murphy, *Getting a PhD in Law* (Hart Publishing 2011) 29.

acceptable answers to research questions',[30] and he explains further that one of the most important objectives of a research is to 'collect information with a view to solving problems'.[31] The theme of this research indicates that it is essentially a legal research in nature. It should therefore be dealt with through an appropriate approach based on comparison and analysis of existing oil agreements, contractual literatures including regulations, laws and decision of court.

This research utilised a mixed method of Black Letter Law, Comparative Legal Analysis and the Socio-Legal (law in context) approaches in responding to the research questions in this thesis. Black letter law methodology is applied in the present research as an analysis of a number of technical legal provisions that are found in primary sources; the Nigerian Constitution and in particular, Nigerian Company Act 1968,Companies and Allied Matters Act, 1990 (CAMA), Nigerian Associated Gas Re-Injection Act (Continued Flaring of Gas Regulations) , 1984, Oil and Pipelines Act, 1956, Petroleum and Distribution (Anti- Sabotage Act, 1975, Petroleum Drilling and Production Regulation 1969, Oil in Navigable Waters Act, 1968 and the Arbitration and Conciliation Act, 2004 just to mention a few. The aim of this approach is to effectively organise and describe the legal rules as authoritative legal sources in order to provide an account of their importance in the case law analysis as well as to pinpoint the underlying issues in the Nigerian legal system that affect the rights of its citizens as

[30]Charles Chatterjee, *Methods of Research in Law* (2nd edn, Old Barley Press 2000) 16.

[31] Charles Chatterjee (n 30).

discussed in chapter 2,[32] chapter 4, [33]and chapter 5[34] of the thesis. In addition, Morris and Murphy observed that the Black Letter or Doctrinal Analysis 'focuses almost entirely on law's own language of statutes and case law to make sense of the legal world'.[35]Aynalem and Vibhute added that black letter methodology requires the researcher to focus mainly on the law itself rather than its application.[36] Therefore, this research is primarily based on primary resources of information and the secondary resources of information such as books and published articles have been referred to where necessary. Chapter 1 and 2 utilise the primary sources such as bilateral investment treaties involving transnational corporations with analytical investigation to help better understand the operating mechanisms and structure of oil and gas contracts. In addition, the research examines various resolutions of the UN such as United Nations General Assembly Resolution 1962, which brought about Permanent Sovereignty over Natural Resources including special features of oil and gas contracts. It is worth noting that the current research utilises regulations, statutes, government policy documents and relevant case laws to examine the investment treaties. This is to draw out a balanced assessment on BITs from previous works of research that have examined some notable issues relating to investment treaties and identify the lack of treaty provisions that can ensure a symmetric investment protection.

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[32] See figure 2.4.9 entitled: the approach of Nigeria Company Law to Corporate Groups, 2.4.9.1 Compulsory Disclosure requirement under Nigerian Company Law and 2.4.9.2 Transnational Corporations and Human Rights related matters in Nigeria.

[33] See figure 4.2.7 entitled: Arbitration in the Petroleum Industry in Nigeria.

[34] See figure 5.8 entitled: the extent to which environmental principles have been used by the state.

[35] Morris and Murphy (n 29) 31.

[36] Khushal Vihute and Filipos Aynalem, *Legal Research Methods* (Justice and Legal System Research Institute,2009).

The technique of comparison and analysis is adopted in chapter 3 to deal with a comparison between a production sharing agreement and other types of petroleum contracts such as traditional concession and modern concession, joint ventures and service contract. This is to help ascertain whether there are differences and similarities between the PSA and other types of petroleum contracts. It therefore started with a careful examination of each types of contract in a comparative approach. The comparative technique will focus on the differences between the selected petroleum contracts; highlight the differences and what each system can learn from the others. In so doing, it will suggest the best contract type for development and financial purposes.

With regards to the difference between Black letter law and the Socio-legal or law in context approach, Morris and Murphy maintained that the socio-legal (law in context) method looks beyond legal doctrine to understand law as a social phenomenon. In view of this, most legal researchers have considered the socio-legal approach as 'law in action' rather than 'law in books'.[37] Conversely, Hutter had observed that the latter position is not to conclude that socio-legal studies ignore the law in books.[38] It should be made clear that socio-legal studies tend to express the practical application of the law in relation to prevailing social needs rather than the ordinary wordings of law or books. In relation to the current research, the Nigerian domestic law is critically analysed with the aim of gaining insight into the ideology of the judiciary and its application of law. This analysis highlights various issues in relation to arbitration in the petroleum industry in Nigeria. The research has shown the significance of the court decision in tax related arbitration matters. It showed how judges are deviating from their primary function,

[37] Morris and Murphy (n 29) 35.

[38] Bridget M Hutter, 'Socio-Legal Perspectives on Environmental Law: An Overview' in Bridget M Hutter (ed), *A Reader in Environmental Law* (OUP 1999) 4.

which is to apply and interpret the law.[39] The analysis further identifies a number of issues as impediment to effective implementation of environmental law in Nigeria.[40] The law was criticised owing to an imbalance between environmental and economic considerations. It is shown in the course of the research that the law offered maximum protection for the transnational corporations and their business interests.

The current research is also socio-legal (law in context) in nature because of its objective to enforce social regulation within the ambit of environmental pollution. It directs attention to the intervention of the state through law[41] and specifically focuses on the need for the government, transnational corporations (TNCs) and the judiciary to protect the environment through oil and gas contracts, BITs and judicial interpretation. This is clearly shown in chapter 5 of this thesis.

Hutter observed that socio-legal (law in context) scholars are particularly concerned with comprehending the social, political and economic processes that bring law about and shape its form and content as regards enforcement and its daily impact.[42] This latter feature of the socio-legal study is clearly reflected and deployed in chapter 5 of the research which focuses on the host state's involvement in certain types of oil contracts specifically, joint ventures, and how such contracts have hindered the implementation of local law on environmental issues. Selznick reasoned that in law-and-society theory, the phrase 'law in context' points to the many ways in which legal rules and concepts such as contracts and conceptions of justice are animated and transformed by intellectual history; how much legal institutions depend on

[39] See figure 4.2.7 entitled: Arbitration in the Petroleum Industry in Nigeria.

[40]See figure 5.8 entitled: the extent to which environmental principles have been used by the state.

[41] Hutter (n 38) 4.

[42] Hutter (n 38) 4.

underlying realities of class and power.[43] In this vein, it is shown how activities of transnational corporations have affected the growth and application of the law in Nigeria.

With regards to the link between the socio-legal studies and law in context, Qureshi noted that the socio-legal approach studies ‘law in context’, rather than merely in books, and that the law in context approach stimulates awareness of the social aspects of the law and provides a unique understanding of the way law develops and works in different societies.[44] In this vein, it is stated that a succession of academic writers’ are of the view that the primary motive behind some of the extant laws in the oil and gas sector mentioned in chapter 5 were enacted for the protection of transnational corporations’ interest and that the interests of innocent victims of oil pollution were a secondary objective. This could be seen as law in context.

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[43] Philip Selznick, ‘Law in Context Revisited’ (2003) 30 Journal of Law and society 177.

[44] Shazia Qureshi, ‘Research methodology in law and its application to women’s human rights law’ (2015) 22 Journal of political studies 632.

CHAPTER 1

THE CURRENT STRUCTURE OF INTERNATIONAL OIL CONTRACTS

1.1 Introduction

This chapter examines Bilateral Treaties and Energy Charters with an analysis of the degree of fairness or otherwise towards host states. It looks into various treaties involving International Oil Companies ('IOC') with analytical investigation to help better understand the operating mechanisms and current structure of international oil and gas contracts. The UN 1962 Resolution cannot be overemphasised. It is argued that special features of oil and gas agreements are found in the UN Resolution 1803. The Resolution brought about Permanent Sovereignty over Natural Resources (PSNR), it emphasised the importance of economic development of the host states, particularly, the developing countries and their economic independence. However, the 1962 Resolution is critically evaluated in Chapter 2 of this research. This chapter focuses on situations where treaties have been mostly in favour of transnational corporations to demonstrate the lop-sidedness of these agreements against host nations and how a right balance may be struck. Findings from this chapter have shown that some of treaties prevent a host state from hearing domestic claims arising from exploration activities in the local court. This was regarded as a mechanism that weakens the sovereignty of the member states concerned. Evidence is shown within the chapter that submission of disputes to investment arbitration curtails state sovereignty and does not guarantee representation of the local state whose law has been contended.[1] In addition, it is alleged that treaties give transnational corporations a right to bring claims before international arbitral tribunals in accordance with the dispute resolution provisions within the treaties, and this measure may enable the transnational corporations to challenge local laws that are likely to engage their

[1] Valentina Sara Vadi, 'Cultural Heritage and International Investment law: a stormy relationship' (2008) International Journal of Cultural Property 4.

rights. However, the investors have argued that domestic law constitutes a mechanism to expel them from the host state country. The chapter, therefore, examines investor-state cases to establish that the motive behind the treaties is to promote economic relations between the parties and to bring development to the host states and to protect the business interest of transnational corporations. Thus, the cases of ***AES Summit v Hungary,***[2]***CMS v Argentina,***[3] ***Fraport v Phillines,***[4]***Genin v Estonia,***[5]***Inceysa v EL Salvador,***[6]***Maffezini v Spain,***[7] ***Muhammed Ammar Al Bahloul v Tajikistan,***[8] ***Occidental v Ecuador,***[9]***Plama v Bulgaria,***[10]***Saluka v Czech Republic,***[11] ***Thunderbird v Mexico,***[12] and ***WDF v Kenya***[13]are critically discussed.

This chapter also contained highlights of major challenges linked with investment treaties and it is established that the weak bargain power of developing countries and lack of authority required to demand change in the current treaty regime are not the only problems but also include a lack of provision within the treaties to regulate and control investor's conducts. It is established that there is no effective domestic law and legal institution to regulate the activities

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[2] ICSID Case No. ARB/07/22 (ECT, Award, September 23, 20110).

[3] ICSIA Case NO. ARB/01/8 of May 12, 2005; 44 ILM 1205 (2005).

[4] ICSID Case No.ARB/03/25 Award August 16, 2007.

[5]ICSID Case No.ARB/99/2 (US/ESTONIA BIT).

[6] ICSID Case No. ARB/03/26) AWARD AUGUST 2, 2006.

[7] ICSID Case No.ARB/97/7 award on merits November 13, 2000.

[8] Stockholm Chamber of Commerce Arbitration No (064/2008).

[9] ICSID Case N0. ARB/06/11, Award October 5, 2012.

[10] ICSID Case No. ARB/03/24 Award August 27, 2008.

[11] IIC 210 2006, Dutch/Czech BIT.

[12] UNCITRAL/NAFTA arbitration award January 26 2006.

[13] ICSID Case No ARB/0O/7 award October 4, 2006.

of transnational corporations operating within the host states' borders. It has been suggested that regulating investor's activities should be a primary duty of the host states. They should be able to address the problems relating to foreign investors' activities themselves.[14] The chapter looks at various ways that a right balance may be struck between the host state and transnational corporations. It is argued that there is a need for all actors in the oil and gas sector to work collaboratively to ascertain the investments and goals of the transnational corporations and what benefit the exploration projects can bring to the host states and their citizens. The chapter, therefore, analyses the general aspiration of the transnational corporations and at the same time addresses the usual aspirations of a host state from exploration of natural resources and the findings would enable the parties to balance the conflicts of interest and ensure that they benefit from exploration projects.

In providing a background to the above, the historical evolution and origin of bilateral treaties is also explored to explain and highlight the persistent divide between developing and developed world while analysing the rights and protection given to foreign investors in the customary Foreign Direct Investment (FDI).

Before the creation of the numerous Bilateral Treaties, the FDI regime which is governed by customary international law was in place. The FDI regime however proved ineffective because of its failure to provide the type of standard protection and rules wanted by foreign investors.[15]The investors believed that states have a customary right to expropriate, a situation described by Brownlie as the confiscation of investors' assets deliberately without

[14] Tra T Pham, International investment treaties and arbitration as imbalanced instruments: a re-visit, International Arbtration Law Review at page 4.

[15] Kenneth J Vandevelde, "A Brief History of International Investment Agreements" (2005) 157.

justification.[16] Other commentators argued that states were depriving the investors their entitlements with a nominal or no compensation.[17] In such circumstances, the customary law provided for potentially hostile exhaustion of local remedies which may eventually enable investors to call for help from their home states to use diplomatic means to pursue the case.[18]Meanwhile, the priority for developed countries is to maximise protection for their investors that was not available in customary norms. In addition, developed countries also lobbied for the prohibition of expropriation and compensation that is prompt, satisfactory and effective.[19]They were able to use diplomatic protection under customary international law to protect foreign investors by espousing the claim of their nationals against another state.[20] Various types of protective actions are available to an investor's home state including consular action, judicial and arbitral proceedings, negotiations mediation, restorations, reprisals, severance of diplomatic relations, economic pressure, and as a final resort the use of force.[21]

Article 1 of the Draft Articles on Diplomatic protection gives a broad definition of the Diplomatic Protection as consisting of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by a wrongful act of that State to a natural or legal person that is a national of the former State

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[16] I Brownlie, Principles of Public International Law, 6th edn (New York: Oxford University Press, 2007), p.509.

[17] Campbell MeLachlan, Laurance Shore & Mathew Weiniger, *International Investment Arbitration-substantive Principles* (Oxford: Oxford University Press, 2003), p. 509.

[18] Kenneth J Vandevelde, "*A Brief History of International Investment Agreements*" (2005) 157.

[19] OECD Report of the drafting Group on selected Topics Concerning Investment Protection <http://www.oecd.org/daf/mai/htm/1-3b.htm> accessed 20 November 20 2014.

[20] Andrew Newcombe & Lluis Paradell, *Law and Practice of investment treaties: standards of treatment* (2009) 4 and 5.

[21] International Law Commission, *First Report on Diplomatic Protection*, 15 UN Doc, A/CN.4/506 (2000).

with a view to the implementation of such responsibility.[22] Meanwhile, the Permanent Court of International Justice (PCIJ) recognises investors' actions through diplomacy. No wonder, PCIJ declared that espousal by the State is an elementary principle of international law.[23] Though it is optional, the rules relating to nationality of claims, exhaustion of local remedies, and the discretionary character of the diplomatic protection (that whether a state will espouse its national's claim depends on her own will) were developed.[24] The diplomatic protection resulted in the formation of claims tribunals or commission where the early jurisprudence of state-state responsibility for injuries to aliens was also developed.[25] Importantly, the traditional legacy of nationality of claims developed by the diplomatic protection continues to apply to the present time investment claims.[26]

Despite the gains of diplomatic protection, the divide in the approach of the developing and the developed states caused an unsettled notion of customary norms on the right to expropriate and the nature and level of awards to be paid for expropriation. Bilateral Treaties were considered as an alternative to diplomatic protection. They normally allow the settlement of disputes between investors and host states by arbitration. Arbitration is preferred to domestic courts of the host state simply because foreign investors believe that judgement can be easily influenced by politics and local policies. It also takes place in private.

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[22] Article 1 of the draft Articles on Diplomatic Protection adopted by the international Law Commission at its Fifty-eighth session (2006).

[23] The Mavrommatis Palestine Concessions (1924) PCIJ Ser. A, No.2 at 12.

[24] ICJ in Ahmadou Sadio Diallo Case (Republic of Guinea v Democratic Republic of the Congo.

[25] Andrew Newcombe & Lluis Paradell, *Law and Practice of investment treaties: standards of* treatment (2009), p.7.

[26] International investment law: *Understanding Concepts and Tracking Innovations* (2008), Ch.1 Available at: <http://www.oecd.org/dataoecd/3/7/40471468.pdf > accessed22 November 2014.

It is submitted that before the introduction of contemporary BITs, bilateral treaty practice started during the 1920s to 1930s through the US Friendship, Commerce and Consular Relations Treaties (FCCRs) specifying explicit protections for investors and then from the 1940s to 1960s Friendship, Commerce and Navigation Treaties (FCNs) providing state-state dispute resolution by the International Court of Justice (ICJ).[27] It was established that the contemporary BITs provisions are very close to the outline of the US Commercial Treaties. Besides, the language and concepts of FCN treaties on the issues of investments, namely and in summary, the establishment, expropriation, national treatment, most favoured nation treatment or the international law standard for capital transfers are all reflected to a great extent in contemporary BITs.[28] It is further analysed that the divide on customary norms and failure of international community to agree on universal rules to govern foreign investment has led to more expansion of bilateralism and pluralism in the shape of the regionalisation of investment regimes and many BITs and FTAs containing investment chapters have been concluded in the last few decades accordingly. A good example is Article 10 part 3 of Energy Charter Treaty (1969) as well as Chapter 11 of the North American Free Trade Agreement (NAFTA) which came into force on January 1, 1994. An academic writer has argued that making a claim under Chapter 11 is advantageous to foreign investors. He believes that it reduces the possibility of a jury that would be sensitive to the needs of the nation.[29] It also allows host state as well as the investor to appoint their respective arbitrators to present their respective positions and provides

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[27] Won-Mong Choi, "The Present and Future of Investor State Dispute Paradigm" (2007) 10 (3) Journal of International Economic Law 731.

[28] Detlev F Vagts' Comments in "Avoidance and Settlement of International Investment Disputes" (proc.38, April 12- 14, 19840, 78 American Society of International Law Proceedings, pp.46 and 47.

[29] S Gainguly, "The Investor State Dispute Settlement Mechanism (ISDSM) and a Sovereign's power to Protect Public Health' (1993) 38 Columbia Journal of Transitional Law 122.

for the application of international law and not domestic law to the dispute, thereby circumventing the domestic courts of the host state.[30]

Chapter 11 of NAFTA was heavily criticised, especially with regards to the weakened sovereignty of member nations, the high rate of taxes as well as the ad hoc nature of the tribunals and lack of lucidity in NAFTA proceedings.[31] Critics argued further that NAFTA gives foreign investors greater rights than it does to domestic investors.[32] In addition, it is clearly stated in Article 1110 of NAFTA that "no party may directly or indirectly nationalise or expropriate an investment of an investor of another party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment".[33]

A case which highlights the overtly pro foreign investor stance of Chapter 11 is ***Metalclad v Mexico.***[34] The same case establishes that NAFTA's investment dispute mechanism could cost taxpayers billions of pounds. The Government of Mexico was held liable to pay damages of $15.6 million, a burden which was shifted to the tax payers.[35] In addition, the provisions under NAFTA enable investors to directly bring an action against a State government in order to discourage the host State from making otherwise legitimate laws. This claim was further

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[30] S Gainguly (n 29) 123.

[31] AK Anderson, 'Individual Rights and Investor Protection in a Trade Regime: NAFTA and CAFTA' (2006) 63 Washington & Lee Law Review 1066.

[32] AK Anderson (n 30) 1067.

[33]Article 1110 of NAFTA.

[34] *Metalclad Corporation v. United Mexican States* (2001) ICSID Case No ARB (AF)/97/1,40 ILM 36.

[35] *Metalclad Corporation* (n 34) 112-126.

substantiated by the argument that the prospect of litigating costly NAFTA suits might deter governments from enacting law that might result in a suit under NAFTA.[36]

Another major criticism of NAFTA's Chapter 11 is the dispute resolution mechanism which is perceived to be a loophole. Critics contend that the ad hoc nature of the tribunals coupled with the absence of appeals mechanism lead to discrepancy and instability.[37]Nevertheless, the history has indicated that the first BIT was signed between Pakistan and Germany in 1959 and came into force 1962.[38] Several provisions were made in the treaty which covered areas such as full protection and security, non-discrimination, compensation on expropriation, free transfer of capital and state- state dispute settlement by the ICJ with mutual agreement of disputing parties failing which, by an arbitral tribunal on request of either of disputing party. This agreement encouraged other states and they quickly emulated the Pakistan-German example and more BITs were endorsed during 1960s on a similar structure as described above. Initially, BITs were believed to be useful in a situation whereby they are signed between a developing and a developed country according to Deborah.[39] She further explained that the paradigm had shifted and now BITs have been concluded between two developed countries as well as between two developing countries. A typical example is South- South investment agreements.[40]

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[36] J Byrne, 'NAFTA Dispute Resolution: Implementing True Rule Based Diplomacy through Direct Access'(2000). 35 Texas International Law Journal 415, 434.

[37] MR Poirier,' *The Nafta Chapter 11 Expropriation Debate Through the eyes of a Property Theorist'* (2003) 33 Environmental Law 851, 924.

[38] Treaty for Protection of Investment (West Germany- Pakistan) (25 November 1959) 457 UNTS 23.

[39] Deborah L Swenson, "Why Do Developing Countries Sign BITs? (2005) 12 (1) Journal of International Law and Policy 131.

[40] Available at< http://www.unctad.org/ >accessed 12 October 2015.

1.2 **The Balancing of Interest between oil companies and host countries**

Foreign direct investment in petroleum industries requires adequate protection and as a result around 3,000 investment protection treaties have been created by states worldwide.[41]Most of them refer to the International Centre for the Settlement of Investment Disputes.[42]The main purpose of these was described by Salacuse as a way to create a stable international legal framework to assist and protect foreign investments.[43] One commentator posits that "the central aim of Bilateral Investment Treaties (BITs) is to protect foreign investors and their investments".[44] However, this type of legal framework is expected to provide mutual benefits for foreign investors and host states because it will contain terms and standards of treatment that are to be accorded to IOCs by the state. For example, adequate protection and security, fair and equitable treatment as well as substantive guaranty should all be addressed in investment treaties. Most of these treaties are bilateral investment treaties (BITs), also referred to as Investment Promotion and Protection Agreements (IPPAs) and also include regional free trade agreements. In addition, they extended to multilateral treaties such as the Energy Charter Treaties which creates a specific legal framework to promote long-term cooperation in the energy field and to minimise the non-commercial risks of energy-sector investments.[45]Commentators have explained that "the fact that investment treaties contemplate obligations of a state towards the individuals but none or very few obligations of the investor towards the state has been signalled by some as a particular deficiency of the investment

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[41] Available at <http://www.iisd.org/investment/law/treaties.aspx> accessed 27 October 2014.

[42] R Dolzer and C. Schreuer, *Princinples of International Investment Law* (Oxford, 2008) p. 20.

[43] Salacuse, The Law of Investment Treaties (OUP, 20100) 109.

[44] Bernhard Maier, 'How has international law dealt with the tension between sovereignty over natural resources and investor interests in the energy sector? Is there a balance?' (2010) International Energy Law review 7.

[45] Jessica Gladstone & Nicola Leslie, 'Energy and investment security: protection under international law' (2013) International Energy Law Review 1.

regime".[46] Meanwhile, Sornarajah referred to the globalisation process as "a power-based process which seeks to secure the rights of business over the rights of people" and underlined an evolution from a host state with duties towards the investor to a host state with rights in relation to the investor.[47] It is not known how the alleged imbalance of interest will be resolved. It has been debated whether the way to address the issue should be by simply including new terms in the investment treaties or not as a general concern. The only certainty is that, it is difficult for an arbitrator to conclude that the sovereign choice of the state when entering into an investment treaty to gain the rights of business has priority over a subsequent choice of the state to secure the rights of people.

It is claimed that investment treaties are recognised by states globally as mechanisms to promote economic relations between them, to increase investment and prosperity in host states, and to protect foreign investors by reference to the standards agreed in the treaty.[48] The critics[49] argue further that, one of the treaties' features actually prevents host states from hearing domestic claims arising from exploration activities in the courts of the host state. Rather, it gives investors a right to bring claims before international arbitral tribunals, in accordance with the dispute resolution mechanisms in the treaties. This is a clear indication that the domestic laws may be too difficult to predict or unreliable. In addition, Valentina says, "it seems that the regime established according to investment treaties does not strike the right balance between

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[46] X Herrera-Bernal - Int'l Bus. LJ, 2013, p,1.

[47] Muthucumaraswamy Sornarajah, *the International law on Foreign Investment,* 3rd ed, (Cambridge University Press, 2010), pp 169- 203.

[48]Jessica Gladstone & Nicola Leslie, *Energy and investment security: protection under international law* (International Energy Law Review 2013) p,1.

[49]X Herrera-Bernal - Int'l Bus. LJ, 2013, above at 32, Valentina Sara, at 36 below, T walde at 38 and Van Harten, at 39.

the parties concerned".[50] She argues further that investment agreements make provisions for an extensive protection of investors' rights. She believes they offer investors a distinctive dispute settlement mechanism, that is arbitration between the foreign investor and the host state. Meanwhile, this option enables foreign investors to challenge any national law that is likely to infringe on investor's rights.[51] Other critics have asserted that, generally speaking, bilateral investment treaties do endorse a "one-sided focus on investor protection and thereby government-only discipline".[52] This connection raises an important question: if domestic regulation aimed at protecting state interests can be challenged by international investors, is arbitration an appropriate forum to protect that interest?

Theoretically, investment treaty arbitration is viewed as public law because it replaces courts with a private model of adjudication in matters of public law.[53] In response to this question, Herrera -Bernal emphasised the difficulty faced in practice by arbitrators when dealing with investor-state cases, in order to ensure equal treatment between competing interests of the parties to the arbitration, which are of a different nature.[54] Many States have expressed their dissatisfaction over the fact that the submission of disputes to investment arbitration curtails their sovereignty. One commentator explained further that "it is indeed a common complaint of States that the submission of disputes to investment arbitration curtails their sovereignty".[55]

[50] Valentina Sara Vadi, Cultural Heritage and international investment law: a stormy relationship (International Journal of Cultural Property 2008) pg 1.

[51] Valentina Sara Vadi (n 50).

[52] T Walde and S. Dow, 'Treaties and Regulatory Risk in Infracstucture Investment—The Effectiveness of International Law Disciplines versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infracstructure Investment' (2003) 34 Journal of World Trade 1 at 19.

[53] Van Harten, Investment "The public Private Distinction," 372.

[54]X Herrera-Bernal - Int'l Bus. LJ, 2013, p,1.

[55] X Herrera-Bernal (n 54) 2.

It is further argued that, investor-state arbitration neither grants the public a formal role in the proceedings nor guarantees representation of the local state whose law is also been contended.[56] It is not disputed that a method is required to settle investor-state disputes, but the use of arbitration is not a suitable option because most of its decisions have shown some shortcomings that need to be redressed. The following cases are good examples where investors argued that domestic legislation constituted a vehicle to expel investors from the host country.

In ***Occidental v Ecuador,***[57]the tribunal made an effort to describe the responsibility of the actors in petroleum contracts, both investor and host state. Occidental Petroleum Corporation entered into a petroleum participation contract with the host state of Ecuador in May 1999 to explore and exploit hydrocarbons in one of the blocks, specifically block 15 located in the Amazonia. Meanwhile, in October the following year 2000, Occidental entered into a farmout agreement with Alberta Energy Corporation, pursuant to which Alberta Energy Corporation acquired 40 per cent economic interest in Block 15 in return for certain capital contributions. The transfer, however, breached both the participation contract and Ecuadorian law, which required ministerial authorisation. In 2006, the host state decided to terminate the original contract with Occidental and issued a decree declaring the c*aducidad*of the contract. The declaration was made on the basis of Occidental having effected an unauthorised transfer of economic interest without approval of Ecuadorian government and in contrary to the Hydrocarbons Law and the participation contract.

[56]Valentina Sara Vadi, Cultural Heritage and international investment law: a stormy relationship (International Journal of Cultural Property 2008) pg 4.

[57]*Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case N0. ARB/06/11, Award October 5, 2012.

Occidental argued that the host state's decision to terminate the contract was an administrative action based on legislative powers and therefore, needed to be implemented in a proportionate manner.[58] In addition, they alleged that the host state terminated the contract without cause, that is, in absence of a termination event under the original contract, Ecuador breached its obligations under both the participation contract and bilateral treaty. They argued further that the Farmout Agreement did not operate as an Assignment of rights in violation of Ecuadorian Law. Even if at all termination event was found to have taken place, they believe that the termination would still be in violation of Ecuador's obligations under bilateral treaty as well as Ecuadorian law because it was arbitrary, unfair, disproportionate and discriminatory.

Ecuador argued in its defence, that the Farmout Agreement effected an assignment and therefore required government authorisation, as required by Ecuadorian law. It argued further that Occidental was liable for a number of violations of Ecuador's Hydrocarbons law, that the Caducidad Decree actually complied with the international law and Bilateral Treaty and that no expropriation took place. A Caducidad decree is an Ecuadorian law principle and administrative decree through a declaration by the Ministry of Mines and Energy to terminate the two agreements between the parties. Ecuador therefore argued that the Caducidad had been a bona fide administrative sanction in furtherance of a legitimate regulatory policy.[59]

The ICSID Tribunal determined that the Farmout Agreement entered into was actually in violation of Ecuadorian law, since it was not authorised by the host state. Nevertheless, the tribunal held that the termination of the participation contract was a disproportionate response to Occidental's assignment of rights under the Farmout Agreement. The tribunal explained further that there were a number of options to terminating the Participation Contract; the latter

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[58] Occidental Petroleum Corporation (n 57) 388-392.

[59] Occidental Petroleum Corporation (n 57) 454.

should have been used as a last resort. The Tribunal noted that Ecuador did not suffer "any quantifiable loss as a direct result of a third party taking an economic interest in Block 15".[60] Therefore, the termination of the contract was disproportionate to its objective. The tribunal held that the Caducidad Decree was issued in violation of Ecuadorian law, which recognises the proportionality principle, and in breach of the Bilateral Treaty and customary international law. The tribunal eventually held that Ecuador's measures were "tantamount to expropriation".[61]It then analysed the proportionality of the sanction in view of Ecuador Constitutional and Administrative laws and then in the context of International investment disputes.[62]

The tribunal decision in the above case established that the principle of proportionality must be observed in a variety of international law settings and it must also be applied to potential breaches of Bilateral Treaty obligations such as fair and equitable treatment obligations. To this end the Tribunal noted.

> …the overriding principle of proportionality requires that any administrative goal must be balanced against the investor's own interest and against the true nature and effect of the conduct being censured.[63]

The decision which emerged from this case emphasised the application of the principle of proportionality as an important part of fair and equitable treatment under BITs. The decision further illustrates the power of investment arbitration. In addition, the issue of fair and equitable

[60] Occidental Petroleum Corporation (n 57) 445.

[61] Occidental Petroleum Corporation (n 57) 455.

[62] ibid 401 -409.

[63] Occidental Petroleum Corporation (n 57) 450.

treatment was also considered by the tribunal in ***CMS v Argentina***[64] and held that provision under BIT had been engaged because Argentina had acted contrary to the investment agreement made before its economic crisis in 2001. This case was decided in favour of the foreign investor. Meanwhile, in the case of ***Saluka v Czech Republic***[65] the tribunal also held that the fair and equitable standard was breached because of the non- transparent and discriminatory way in which the government had acted.

With regards to BITs, which Skovgaard described as having as their stated purpose a measure to protect and promote foreign investment.[66]Denza and Brooks emphasised the importance of bilateral agreements and concluded that "the investment protection agreements have undoubtedly played a significant role in giving precision to the standards to be observed and, to a large extent, in taking the political steam out of the whole subject of the treatment of foreign investment".[67] Investment in a petroleum project involves significant development expenditure involving maximum protection and assurance. Particularly, concessions for the extraction of mineral and petroleum wealth entered into by governments should be honoured by those governments. Without this expectation, foreign investors would not be prepared to take the risk. In order to minimise the risk, oil companies often request some form of assurance and protection in the investment regime so that either the conditions of the agreement are respected by the host state, or some form of compensation or redress are guaranteed when there is a unilateral change to the original agreement or subsequent change in domestic legislation.

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[64]*CMS Gas Transmission Company v Argentine Republic*, ICSIA Case NO ARB/01/8 of May 12, 2005; 44 ILM 1205 (2005).

[65]IIC 210 2006, Dutch/Czech BIT at 255.

[66] Lauge Skovgaard Poulsen, European Journal of International Law, The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows. Publication review (2009) page 1.

[67] Shelagh Brooks and Eileen Denza, *Investment protection treaties*: *United Kingdom experience,* International & Comparative Law Quarterly 1987.

However, regardless of promises of protection and assurance in investment treaties; disputes still arise, and it can only be resolved through international arbitration.

Supporters of the Investment Treaty Arbitration (ITA) argue that its structure, substance and procedures are geared towards achieving greater coherence by balancing competing human rights and economic interests and values.[68] Others have argued that the present structure of the ITA coupled with the development of substantive norms of international investment law are composed of a more balanced approach to resolving problems between competing interests and it has so far proved itself as a legitimate system for rights adjudication.[69]

Several institutions have emerged to provide international investment arbitration services. These institutions are well recognised, and they have followed independent rules of procedure to provide impartial dispute resolution services, uninfluenced by domestic policies or politics of host states. In addition, there are some notable developments regarding the approaches taken by investment tribunals to safeguard the regulatory autonomy of a host state. Some of these approaches and cases dealt with the tribunals highlighted the reasons ITA could be perceived as an unbiased, balanced, reliable and responsible system.

For example, a host state's actions can be justified if there is a compelling need to maintain public order. According to the provision under article 24 (3) of ECT, a contracting party shall not be prevented from taking any measure which it considers necessary "for the protection of its essential security interest" and/or "for the maintenance of public order". In ***Saluka v Czech Republic,***[70] the legitimate rule of the financial services sector was acknowledged. The Tribunal

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[68] Ahmad Ghouri, Positing for Balancing investment Treaty Rights and the Rights of Citizens, Contemporary Asia Arbitration Journal 2011 4 (1) 95.

[69] Ernst-Ulrich Petersmann and Francesco Francioni, Human Rights in International Investment Law and Arbitration, (New York: Oxford University Press, 2009), pp 3-20.

[70] *Saluka Investment B.V. (The Netherlands) v The Czech Republic* IIC 210 2006, Dutch/Czech BIT at 255.

held in this case that states were not liable for adopting "in a non-discriminatory manner bona fide regulation that are meant for the general welfare".[71]

Tribunals have also ruled in a similar case ***Genin v Estonia***[72] that Estonia was right to act as a sensible and concerned supervisor of the banking sector. The investor alleged that the host state's revocation of its bank's operating licence constituted a violation of the BIT, as well as Fair and Equitable Treatment standard which is believed to be the cornerstone of international investment law. However, the investor's failure to disclose the true identity of the shareholders of its parent companies was one of the grounds that justified the host state's action. The tribunal discovered that an investor is required under Estonian law to provide clear information on such beneficial ownership. Therefore, a failure to cooperate was the cause of legitimate concern which eventually urged the interference of the host state, that is, the revocation of its operating licence.[73] In this regard, tribunal held that the regulation concerned actually reflected a clear and legitimate exercise of the central bank's regulatory and supervisory responsibilities and that the Estonian government " had acted within its statutory discretion… and its ultimate decision could not be said to have been arbitrary or discriminatory against the foreign investors".[74]

Furthermore, the case of ***AES Summit v Hungary***,[75] where the Tribunal found that Hungary's enactment of the 2006 Electricity Act Amendment did not breach investment standards under

[71] Saluka Investment (n 70).

[72] Genin & Ors v Estonia ICSID Case No.ARB/99/2 (US/ESTONIA BIT).

[73] Genin v Estonia (ICSID case no. ARB/99//2) award June 25, 2001 at 362.

[74] Genin v Estonia (ICSID case no. ARB/99//2) award June 25, 2001 at 363.

[75]AES Summit Generation Ltd and AES-Tisza Eromukft v The Republic of Hungary ICSID Case No ARB/07/22 (ECT, Award, September 23, 20110).

the Energy Charter Treaty. The challenged measure had reintroduced regulated prices, which imposed a cap on the profit entitlement of companies in the energy sector and were applied equally to all generating companies. An ICSID Tribunal decided that Hungary's creation of price decrees in answer to public outrage over the alleged high profits of public utility companies did not amount to expropriation, simply because it did not deprive the investor of effective control of its investment or deprive it significantly of value. This ruling indicates that claims under the Energy Charter Treaty might be less likely to succeed where investors are making excessive profits and it could be acceptable reasons for government of the host state to make law. Thus, there had been no breach of fair and equitable treatment, national treatment, impairment of investment, most favoured-nation treatment, constant protection and security of expropriation.

As also illustrated ***in Muhammad Ammar Al Bahloul v Tajikistan***,[76] proof of expropriation requires a higher level of interference otherwise the claim would fail. The Tribunal held that the state's temporary failure to issue an exploration licence was not considered expropriation unless it could be established that the state terminated its contract, or it has refused to perform its obligations under the underline contract. Although Tajikistan was held to be in breach of art 10(1) ECT, arbitrators rejected most claims advanced by the claimant but ruled that Tajikistan had failed to live up to commitment in four contracts to issue licenses for exploration in four designated areas of the country. Therefore, the tribunal reserved judgement as to the relief to be granted to the claimant who sought orders of specific performance.

[76]*Mohammad Ammar Al-Bahloul v The Republic of Tajikistan Stockholm, Chamber of Commerce Arbitration*, No (064/2008).

In ***Inceysa v El Salvador***,[77] the duty of an investor and investment to abide by the host state's domestic laws was explored through the lens of the Spain-El Salvador BIT's provision asking that an investment be made "in accordance with the law of the host country". The Tribunal affirmed that its competence to hear the dispute depends on the legality of the investment. In the tribunal's view, it was clear and obvious from the intent of the parties to the contract that investments made illegally, that is, in breach of host state's domestic law are excluded from the scope of the BIT, and therefore, any disputes arising as a result fall outside its jurisdiction. The claimant's (Inceysa) breaches of the laws of El Salvador were established. Facts presented to the tribunal indicated that the investor had acted in deceitful manners throughout the bidding process. All of these acts were considered and held to have breached general principles of law which according to the tribunal are part of the laws of El Salvador. They include the principle of good faith, international public policy, the nemo auditor propiamturpitudinemallegans principle, and the principle prohibiting unlawful enrichments. Importantly, the Tribunal concluded that dispute could not be heard because the contract was formed illegally so tribunal is incompetent to hear it.

Furthermore, in the case of ***Fraport v Philippines***[78]th***e*** tribunal acknowledged that respect for the laws of the host state is a critical part of development and a worry for international investment law. The dispute occurred between the government of Philippine and a German company (Fraport) in relation to the annulment of the concession contract for the construction and operation of an international passenger terminal at Ninony Aquino International Airport in Manila ("Terminal 3"). The concession contract was concluded 1997 between the Philippine company known as Philippine International Air Terminals Co ('PIATCO') and Philippine

[77]*Inceysa v El Salvador* (ICSID Case No ARB/03/26) AWARD AUGUST 2, 2006.

[78]*Fraport v Philippine* (ICSID Case No.ARB/03/25) Award August 16, 2007.

Department of Transportation and Communication. In 1999, Fraport, a German company in international airport business, became a shareholder in PIATCO later acquired the ownership of PIATCO by holding 61.44% of the shares in 2001. Fraport also signed a confidential shareholder agreement to exercise managerial control over the company. In 2002, the Supreme Court in the Philippines ruled that a 1997 concession agreement to build Terminal 3 was null and avoid ab initio for violations of host state law and public policy. Meanwhile, Terminal 3 was nearly completed by the PIATCO at the time of the decision.

After failed negotiations for compensation from the Philippine Government, Fraport requested arbitration with ICSID. PIATCO alleged several breaches of the Germany-Philippine BIT particularly, obligations towards an investor in the Philippines, including expropriation. However, the host state challenged the Tribunal's jurisdiction on the basis that the claimant's investment was not accepted in accordance with the laws of the host state as stated under article 1(1) of the BIT and further denied all liability under the BIT. They argued further that the Terminal 3 concession was a public utility subject to the nationality restrictions of the host state constitution and the prohibitions imposed by the Anti –Dummy Law which prevent foreign ownership and control of national company and that Fraport deliberately sought to side line the nationality requirement which put a limit on foreign ownership of the capital of a public utility to 40% through the back door, by holding 61.44% of the share and by signing the confidential shareholder agreement in order to exercise control over the company. It was a deliberate act to claim the ownership of the company indirectly.

Based on the facts of this case and relevant accompanied evidence, the Tribunal held that Fraport consciously, intentionally and covertly structured its investment for mere economic reasons in a way which it knew to be in violation of the law of the host state, specifically the foreign ownership and control legislation known as Anti-Dummy Law.[79]As a result, the tribunal held that there was no investment in accordance with law and that it did not have jurisdiction rationemateriae to rule on the Fraport allegations of breaches by the host state of certain provisions of the BIT and dismissed the case.

Similarly, the case of ***Maffezini v Spain***[80] established that failure to comply with the host state's law and regulations might exclude foreign investors from treaty right to which they would otherwise be entitled. The investor brought a claim and alleged that host state had breached its obligations under the Argentine-Spain BIT, for suspending the construction of the chemical plant. The Tribunal recognised that under the Spanish constitution[81] and Spain's Decree on Environmental Impact Assessment (EIA), investors in chemical industries are required to carry out an EIA, and the Spanish government reserved the power to discontinue any chemical project that has started before the EIA is approved.[82] The Tribunal held that it was clear that the investor decided to carry on with its project before the EIA was finalised, despite his awareness of the requirement under Spanish Law. In doing so, the tribunal concluded that he deliberately and consciously evaded the obligation in order to avoid additional costs.[83] Accordingly, the tribunal held that the host state measure, which aimed at ensuring the observance of its laws by any business entity operating within its jurisdiction, did not amount to a breach of the BIT.[84] Article 2(1) of the Argentine-Spain BIT, calls for the

[79]*Fraport v Philippine* (ICSID case no.ARB/03/25) Award August 16, 2007 at 323 and 398.

[80]*Maffezini v Spain* (ICSID case no.ARB/97/7) award on merits November 13, 2000.

[81] EEC Directive 85/337June 27 1985.

[82]*Maffezini v Spain* (ICSID Case No.ARB/97/7) award on merits November 13, 2000 at 69.

[83]*Maffezini v Spain* (ICSID Case No.ARB/97/7) award on merits November 13, 2000 at 70.

[84]*Maffezini v Spain* (ICSID Case No.ARB/97/7) award on merits November 13, 2000 at 71.

promotion of investment in compliance with national legislation and the provision was in line with the tribunal ruling on this case.

Moreover, in ***Thunderbird v Mexico***,[85]where Thunderbird claimed that Mexico's regulation and closure of its gaming facilities breached the national treatment obligation under Art 1102; the most favoured nation treatment obligation under Art 1103 also Art 1104 obligation to accord the better of the treatment required under Art 1102, 1103 as well as the obligation to provide treatment in accordance with international law under Art 1105(1) and finally breach of obligation under Art 1110 which prohibit expropriation. The lack of transparency on the part of the investor was the main contributory factor that defeated its claim of breach of the Free Trade Agreement (FTA). This was a case of a dispute relating to a US investment in a gaming operation activity in Mexico. In this case, the claimant claimed a violation of its legitimate expectations, created by Mexico's official statement which provides positive support and acceptance of its gaming activities (THE OFICIO). However, the Tribunal decided that no such legitimate expectations could have existed, due to Thunderbird's lack of transparency and improper disclosure of information when he applied for the approval of the gaming operation in Mexico. Consequently, the claimant had provided incomplete and inaccurate information at the time of application in regard to the nature of its investment, which eventually misled the appropriate body in Mexico to produce its statement in the Oficio. As a result, the claim should fail.[86]

[85]*Thunderbird v Mexico UNCITRAL*/NAFTA (arbitration award January 26, 2006) <http://www.naftaclaims.com/Disputes/Mexico/Thunderbird Award.pdf> accessed 24 April 2015.

[86]*Thunderbird v Mexico* UNCITRAL/NAFTA arbitration award January 26, 2006, at 151 – 156.

Similarly, in ***WDF v Kenya***[87]where tribunal held that agreements stained with corruption could not be enforced and that bribery is contrary to the international public policy of most countries.[88] In this case, the issue of corruption and bribery was extensively examined. An agreement for the construction, operation and maintenance of duty-free complexes was concluded between Kenya's government and World Duty Free Ltd. The claimant WDF brought an action before arbitration alleging that the host state had breached the agreement in several respects which established expropriation of its properties. The host state argued in its defence that the award of the initial contract was obtained by an unlawful act, because the investor had bribed the then President of Kenya (Daniel Arap Moi) with US $2 million. Therefore, the host state asked the tribunal to declare the contract unenforceable and to dismiss all other claims associated with the contracts.

The Tribunal found that "the undisclosed payments to president Moi could not be seen as a personal donation for public purposes…but must be regarded as a bribe in anticipation of obtaining the conclusion of the investment contract".[89] After thorough examination of both domestic and international legislations, including court and arbitral decisions, the tribunal pointed out that bribery is contrary to the international public policy of most states.[90] In addition, it emphasised that contracts tainted with corruption are illegal and, hence claims based on such contracts must not be upheld.[91]

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[87](ICSID) case no. ARB/0O/7) award October 4, 2006.

[88]*WDF v Kenya* (ICSID) case no. ARB/0O/7) award October 4, 2006.

[89]*WDF v Kenya* (ICSID) case no. ARB/0O/7) award October 4, 2006 at 137.

[90]*WDF v Kenya* (ICSID) case no. ARB/0O/7) award October 4, 2006 at 157.

[91]*WDF v Kenya* (ICSID) case no. ARB/0O/7) award October 4, 2006 at 157.

The invalidity of a contract based on fraudulent misrepresentation was also upheld in ***Plama v Bulgaria award***.[92] In this case, the investor Plama, a Cyprus-based company, acquired shares in a privatised refinery in Bulgaria. Meanwhile, the approval of the acquisition by the host states' authority was granted as a result of the investor's fraudulent misrepresentation. The owner of the Plama, Mr Vautrin had already presented as a consortium of two companies with sufficient assets and experience needed to acquire the refinery. But the Bulgarian's authority later discovered that those parties had withdrawn, and that Mr Vautrin, who personally did not possess the quality and financial resources, failed to disclose the true identity of the investors in the refinery, and continued to act in the guise of the consortium.[93] Tribunal held that concealment of information amounted to fraud, which violated host state domestic law as well as international law. As a result, no protection of the Energy Charter Treaty could be granted to the investor and his investment.

The decision from the above cases signals a positive trend that arbitrators are challenging the conduct of foreign investors. It has been established through these cases that investment treaties impose some reciprocal obligations on host nations as well as foreign investors. It is further submitted that the tribunals' consideration of investor obligations was derived and based on international law principles, including transnational public policy also known as the principle of good faith, the principle that nobody can benefit from his own wrong, and the principle of international public policy which requires compliance with both domestic and international laws. In this regard, supporters of the treaties believe decisions that emerged from the above cases might encourage host states to raise defences and bring claims regarding investor conduct to the tribunal in order to justify their alleged violations of treaty obligations. Therefore,

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[92] *Plama v Bulgaria* (ICSID Case No. ARB/03/24) Award August 27,2008.

[93] *Plama v Bulgaria* (ICSID Case No. ARB/03/24) Award August 27,2008 at 129.

consideration of the protection of investor expectation can now be perceived as a specific application of the more general notion of balance between the protection of investor confidence and host state's regulatory powers. Subsequently, Pham added that, investor protection is somehow restricted by the desire to maintain a reasonable degree of regulatory flexibility on the part of the host government to take legislative action in the public interest.[94]He explained further that the approaches adopted in investment-treaty arbitration are no longer the same, they have moved from being pro-investor or insensitive to host states regulatory rights to striking a balance between host state and foreign investors rights and obligations.[95] Thus, if the host state believes there is a tendency of certain arbitrators to favour claimant-investors, host states could decide to withdraw from the system altogether as revealed by the denunciation of 11 BITS.[96] Ecuador alone had denounced 9 Bits, Netherlands-Bolivia BIT and EL Salvador-Nicaragua BITs were denounced. Nyombi and Mortimer posit that countries around the world, Australia, Poland, India, Indonesia, Russia and South Africa, to mention a few, both developing and developed, have intimated a further termination and withdrawal from international investment protection. The rationale behind this idea is a perceived imbalance of international arbitral decisions that are believed to be the cause of an encroachment on national sovereignty.[97]

The rise of investment treaties has attracted critical attention from various scholar critics and non-governmental organisations (NGOs). Also, there has been a considerable amount of

[94] Tra T Pham International investment treaties and arbitration as imbalanced instruments: a re-visit, International Arbtration Law Review at page12.

[95]Tra T Pham (n 94) 17.

[96] UNCTAD report revealed that Ecuador denounced 9 BITS and the other two denounced BITs are EL Salvador-Nicaragua BIT as well as Netherlands-Bolivia BIT.

[97] Chrispas Nyombi, Tom Mortimer, Rights and Obligations in the post-investment treaty denunciation period, International Arbitration Law Review (2018) at 47.

literature criticising the irregularity of the international investment protection regime because the treaties create obligations for host states but not for investors. Meanwhile, it created rights for investors but not for host states. The absence of responsibilities such as environmental, social and fundamental human rights, as well as other obligations relating to corporate responsibility has led to an imbalance where only foreign investors can bring claims against host states before a Tribunal.

It is not disputed that investors' conduct is not regulated in investment treaties. This claim was supported by the simple fact that there was no recognition for a corporation's liability in international investment treaties.[98] Apart from a handful of international investment agreements such as the Investment Agreement for the COMESA Common Investment Area (CCIA) there was a provision under art.13 "Investor Obligation" that investors and their investment shall comply with all applicable domestic measures of the member state in which their investment is made". In addition, Art. 72 of the EU-CARIFORUM Economic Partnership Agreement allows Member States to take measures against investors of corrupt practices and violations of core labour standards and imposes other obligations of public concerns on investors.

1.3 **Lack of treaty provisions which ensure a symmetric investment-protection system**

It is claimed that developed countries have enhanced documented transparency in investment treaties in order to safeguard their regulatory powers.[99] For example, most of the treaties concluded by developed country such as the United State of America, Canada and Australia just to mention a few and contain general exception clauses which allowed reasons for

[98] Tra T Pham International investment treaties and arbitration as imbalanced instruments: a re-visit, International Arbtration Law Review at page 3.

[99] Kathryn Gordon, International Investment Agreements: A survey of Environmental, Labour and Anti-Corruption Issues in International Investment Law, Understanding Concepts and Tracking Innovations (OECD,2008) page 135.

justifying regulatory measures.[100] In particular, the Chile- Peru Free Trade Agreement clearly indicated that measures which are designed and to be applied for public-welfare purposes do not usually constitute indirect expropriation.[101] Meanwhile, developing countries are still facing difficulties in amending and renegotiating Bilateral Investment Treaties (BITs).[102] In addition, Howard rightly asserts further that, a lack of regulatory right in investment treaties to protect states from claims for compensation has made them much more vulnerable to the uncertainties of the process, and the vagaries of relying on a three-person arbitral panel.[103]

It is submitted that the weaker bargaining power of developing countries as well as the cost to renegotiate and amend BITs are not the only problems, but the reason may also include lack of power required to push for a change in current investment treaty regime. For example, it is clear from the reference to the developed countries above that, they have responded well to the obstacles and challenges posed by the provision of BITs. As discussed in the Chile-Peru agreement (FTA), the two states have successfully incorporated exception clauses into the terms of their agreement which eventually put them in an equal standing. Each of them participated in treaty negotiation, as both share the same interest in keeping regulatory right in the course of protecting foreign investment from the partner's country. On the contrary, developing states rely and depend on the investor-state dispute-settlement mechanism in the Bilateral Treaties (International Arbitration).

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[100] Canada 2004 Model BIT, US 2004 Model BIT, and Australia- Singapore Free Trade Agreement.

[101] Chile-Peru Free Trade Agreement (FTA), annexe B, B13 (1) and Annexe 11.D.

[102] Howard Mann, *International Investment Agreements, Business and Human Rights* (IISD paper, February 2008) page 25.

[103] Howard Mann (n 102).

1.4 Lack of provision in regulating investor conduct in Investment Treaties

It is established that investment treaties are silent on the conduct of foreign investors and the failure to make a provision has attracted debates from the both sides, namely the host state and foreign investors. On the part of the foreign investors, it is evident that they are not keen on pushing for the adoption of a binding mechanism whereby foreign investors are automatically bound by international law as this may enable host state to enforce these obligations through international arbitration. The international business has capitalised on this and they have shown reluctance towards readily accepting any positive duty to protect and observe these rights which they considered as the responsibility of the state. For example, one of the very first multinational corporations to show this attitude was Levi Strauss & Co. They created comprehensive Global Sourcing and operating guide line in 1991 which provide for business partner terms of engagement and covered ethical, environmental requirements, health and safety standard and legal requirement as well as employment practice guidelines which applied to all of the company's individual business partners. Similarly, the Shell group adopted a different principle which sets out commitments to sustainable development, social value and human rights. It also formed a social responsibilities committee to review the policies and conduct of shell companies with regards to the business principles.[104]

The above examples have shown that multinational corporations prefer to share duties with the host state on a voluntary basis rather than a mandatory obligation under the treaties. Besides, private codes of conduct could not be enforced. Thus, it could be argued that transnational corporations are fulfilling their responsibility towards the host state and the local community on voluntary basis with no binding mechanism. In addition, according toMuchlinski, an attempt

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[104] Profits and principles—Does there have to be a choice? Shell Report 1998 Available at <http://www.reports.shell.com>shell_report_1998> accessed April 30 2015.

to develop a new social and environmental responsibility agenda has been perceived as a move that is likely to create soft law obligations.[105]

From the perspectives of the developing host states, they tend to focus on the issues that have been catered for in the treaty that is, investment protection. By so doing, they forget to emphasise on the most needed aspect, the control of the activities and conduct of foreign investors. As mentioned earlier, there is still no recognition for an investor's liability and majority of the host states in developing countries have failed to make use of the international agreements as a weapon to tackle the issue of investors conduct. Presently, there is no effective domestic legislation and legal institution to regulate and check the activities of multinational corporations operating within their respective borders and territories. Meanwhile, they are in the right position to advocate and press for a change in current investment treaties. Otherwise, they might see the creation of internationally enforceable obligations for foreign investors as a means of over-riding their national sovereignty.[106]

The case of ***the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria***[107] is a perfect example of a situation where a host state has failed to regulate and check the activities of International oil companies. It was alleged in the above case that the Federal government of Nigeria took part in oil production through Nigeria National Petroleum Development ('NNPC') in association with Shell Petroleum Development

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[105] Peter T Muchlinski, *Multinational Enterprises and The law on Foreign Investment*, 2nd edn (CUP,2007) page 535.

[106] T Walade, Improving the Mechanism for Treaty Negotiation & Investment Didpute: Competition and Choice as the path to quality and legitimacy, in K. Sauvant (ed), Yearbook on International Investment Law and Policy 2008-2009, OUP, 2009) page 53.

[107] Evaristus Oshionebo. Transnational Corporation, Civil, Society Organisation and Social accountability in Nigeria oil and gas industry, Africa Journal of International and Comparative Law 2007, Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication NO 155/96, Africa Commission on Human and people's Rights <http://www.umn.edu/humanrts/africa/cases/155-96b.html-> accessed on 22 March 2017.

Corporation in which NNPC held 55% of the share. NGOs alleged that the Oil companies carried out oil exploration in Ogoniland Nigeria without respect for the environment and the health of villagers. As a result of oil related activities, they have contaminated the area and disposed of toxic wastes into waterways which eventually caused health problems and environmental degradation. Oil companies have also failed to develop and maintain appropriate equipment that would have prevented the poisonous wastes from spreading to the villages. It is further alleged that the Nigerian military force engaged in military operations including killing of people, burning and destruction of houses and food.

The African Commission on Human and People's Rights held that Nigeria had violated the African Charter on Human and People's right. Nigeria was found to have breached majority of the Articles Rights including Article 2, right to enjoy Charter guaranteed rights and freedom without discrimination, Article 4, the right to life, Article 14 the right to property, Article 16, the right to health, Article 18(1) the right to housing, Article 21, the right of people to freely dispose of their wealth and natural resources. Also, Nigeria was found to have violated of Article 24 which provides the right of people to enjoy satisfactory environment favourable to their development.[108]

This case served as a precedent for enforcement of cultural, economic and social rights within the international community. And for the host state this case sends a clear message that an action group can force their way to the very highest level to have their case heard if ignored by the state. Thus, it could be argued that NGOs have called into question the purpose of state authority and oil and gas industries. They have made the governments of developing countries

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[108] Dinah Sleton, Decision Regarding communication 155/96, the American Journal of International Law, vol.96.NO.4 Oct 2002 <http://www.jstor.org/discover/10.2307/3070689?uid=19052&uid=3738032&uid=2129&uid=2&uid=70&uid=3&uid=5910784&uid=67&uid=19050&uid=62&sid=21102687195913> accessed 22 March 2017.

aware that this crucial issue should be addressed promptly. They have exposed oil companies' bad practices and brought it to the attention of people around the world.

However, it is not disputed that developing countries are aware that investment treaties are a possible means to prevent unethical conduct and to promote best practices by foreign investors operating within their territory. Yet, having made no provisions under investment treaties, it could be argued that it is a clear deprivation of the opportunity by the states to set up their own domestic laws to tackle these issues. However, one of the commentators asserts on this point that "when a host states accept that investor behaviour is controlled in any international investment treaties, they admit that they are unable to address the problems relating to foreign investors activities themselves".[109] For all the reasons adduced, it could be suggested that, until developing countries show an enthusiasm and push for change in the current investment treaties and the inclusion of legally binding provisions on foreign investors' obligations in the treaties, Multinational Corporations' activities and conduct may never be controlled.

1.5 **How may a balance be struck**

The position of most host states as global exporters of oil[110] makes the industry a breeding ground for interests and conflicts (business related and otherwise), with all actors in the interplay of forces over exploration and exploitations of oil all locked in this '*battle of interest'* including the government, oil companies and in some cases, host communities. However, these conflicts are underpinned by other variables some of which include; economic growth, security and stability, social justice, transparency, governance, ethnic tensions, community participation

[109] Tra T Pham International investment treaties and arbitration as imbalanced instruments: a re-visit, International Arbtration Law Review at page 4.

[110] Nigeria extracts about 93.1 metric tons of oil annually. This accounts for about 2.9% of the total world production. JB Ejobowah,'Who owns the oil? The politics of ethnicity in the Niger Delta of Nigeria' (2000) 47 Africa Today 28-47.

and the rule of law.[111] These interests are reflective of the many aspirations which the major actors believe the rich oil fields will bring to fruition through exploration/exploitation of natural resources and the resultant FDI that comes with it. Invariably, conflicts erupt in balancing these interests and the differing aspirations while exploiting maximally, the natural resources therein.

The government on the one hand, anticipate a huge and consistent flow of revenue from oil companies, the citizens on the other hand, see exploration and exploitation activities of oil companies in their community as key to the improvement of their deplorable living standards while oil companies on their part, expect huge returns from the enormous investments they embark on in the region by virtue of their concession for oil exploration and exploitation. The aspirations of these various groups, fuelled by poor governance, unstable/unclear legal rules and corruption more often than not result in an amalgam problem which breed social tension, nay sowing the seed of conflicts prevalent in the exploitation of natural resources.[112]

It is commonplace that governments of most oil laden nations have much reliance and dependence on oil rents and rates, royalties and taxes paid by oil companies as well as income generated from equity stakes.[113] In the light of this huge dependence, oil companies are hard pressed in meeting these onerous demands imposed on them by the government. Moreover, such reliance on oil companies and oil proceeds breeds the neglect of institutional internal tax regime of citizens thereby eroding the fiscal link between the government and the populace of

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[111] JB Ejobowah (n 110).

[112] JB Ejobowah (n 110) 2.

[113] Omeje K, '*Oil conflict in Nigeria: Contending issues and perspectives of the local Niger Deltapeople*' [2005] New Political Economy, 10(3), pp. 321-334.

which the end point is poor initiative in the provision of social services.[114] The resultant effect of this trend is that the citizenry suffers in the midst of plenty thereby breeding social apathy towards oil companies and creating avenues for conflict between the duos.

Meanwhile, in consideration of the fact that market prices of commodities are prone to constant inflation, economies hugely dependent on oil are vulnerable to market fluctuations affecting their export earnings which may ultimately trigger exchange rate instability. This scenario creates economic instability which ultimately and increases social tensions with potentials of contributing to conflict in the oil sector. This is typified in the "*Dutch Disease"* phenomenon of the 1960s when Netherlands suffered huge economic instability owing to the concentration of their revenue on proceeds from the North Sea oil.[115]

Aside the huge dependence on oil revenue, transparency issues are also root causes of resource related conflicts and clash of interests in most oil producing nations especially in developing countries. The difficulty in obtaining information on government activities and finances in the oil sector greatly heightens this clash. It is normative that the alienation of transparency breeds corruption. Hence, lack of public information with respect to proceeds in this sector, fuelled by the obviousness of the rich-poor divide in most oil producing nations of the developing world heighten prospects for conflict in the oil sector. Matters are made worse by the confidentiality clauses that characterize most concession agreements between oil companies and the government.[116] Kazakhstan is a typical example of such confidentiality agreements. The Kazakhstan government insist that oil companies in the region sign strict confidential product

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[114] Omeje K (113).

[115] Thorvaldur Gylfason. 'Natural Resources and Economic Growth:From Dependence to Diversification' (2001) <thttps://notendur.hi.is//~gylfason/pdf/beirut.pdf> accessed 20 August 2015.

[116] Thorvaldur Gylfason (n 115).

sharing agreements; such corporations are estopped from publicly disclosing their financial transactions with thegovernment.[117]Such practice is evident also in Chad where funds earmarked for certain social projects were never utilized and no information made available to the citizens[118]Angola is another example of such trend where 34 multinational companies made payments of undisclosed sums to the government.[119]Indeed, at one point, the Angola Government banned BP directors from entering the country after they formed a board resolution stating that they would not take bribe. However, it appears that oil companies have increasingly begun to appreciate the need for a comprehensive measure to address transparency related problems. This notwithstanding, these efforts need expediency as some oil companies get entangled in the thick corruption web in some host nations and end up, guarding financial information from the government and certain key policy units of the government.

Unfortunately, the uncertainty and embryonic legal standards that characterise the legal systems of some host nations, coupled with the corruption that has left the legal system porous, add up to root causes of conflict between oil companies and host nations. The institution of clear codes of conduct and standards in relation to social and environmental outcomes will go a long way to bridle the social inequity in the oil sector.

Additionally, the welfare of the local community where the extraction/exploration activity is situated may be potential sources of clash of interests. This issue is central, being that the social

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[117] Thorvaldur Gylfason (n 115).

[118] Wax Emily "Oil Wealth Trickles Into Chad But Little Trickles Down," Washington Post, March 13, 2004.

[119] Human Rights Watch 'Some *Transparency, No Accountability: The Use of Oil Revenue in Angola and Its Impact on Human Rights'.(*2004) < http://www.hrw.org/reports/2004/angola0104/angola0104.pdf> accessed 20 August 2015.

depravation of host communities thereto is not reflective of the economic gains derived from their natural environment. The Nigerian *Niger Delta* region is a classic example of such social inequity[120]. Moreover, human right abuses endemic in oil producing regions of developing countries may possibly be common innuendos of clash of interest.

Admittedly, extractive industries in most developing states will continually experience conflict and clashes of interest brewed and triggered by its major actors owing to the global demand for fossil fuels used in accelerating development in most part of the world coupled with the huge economic dependence on this sector. However, concerted efforts to diversify economic activities, new social investment policies, strengthened governance, transparency, public sector involvement, public awareness, local content observance, and improvements in the overall standards of the citizenry from oil gains may be the answer to temper this '*battle of interests'* in most oil producing nations of developing the developing world. Effecting these changes may not necessarily be easy; hence there is need for all actors in the sector to work collaboratively in achieving this. However, for such collaborative effort to yield a dividend there is a need to consider what really are the interests/goals of the foreign investors in this sector. Do they actually subscribe to the UN FDI and technology transfer initiative or are host nations primarily a means for accelerating profits? This issue forms the next discussion point.

1.6 The general aspiration of oil companies in exploring and exploiting natural resources.

The expropriation wave by developing countries of foreign investment which characterized periods between the 1950s and 1970s did little to deter transnational corporations from investing beyond borders of theirhome states as they continually invested in developing

[120] The Niger-Delta Region is the most underdeveloped region in Nigeria. DN Halleson, 'An Analysis of Natural Resources Related Conflicts in Central Africa and the Gulf of Guinea' (2009) 3 Cameroon Journal on Democracy and Human Rights 47-70.

countries through FDI.[121]This begs the question;what motivates the investment decisions of oil companies in the oil sectors of developing countries even in the face of the multifarious conflicts therein?

To answer the above question, this section attempts to explore the interests and aspirations behind the investments of oil companies. To achieve the desired result, this work will explore and analyse the investment decisions of oil companies in the light of scholarly opinions and critics as well as response and mission statements of transnational corporations. This will be placed at par with the opinion of the host nations as well as that of host communities and all other actors that prevail in the extractive industry of host nations (NGO's and pressure groups) with Nigeria and its oil and gas sector as the focal point. Furnished with these views, a balancing act will be done to throw some light on the interests behind such investment decisions.

1.7 Economic and tax incentives

It is a common notion among legal experts in FDI that investments by oil companies in the developing world, is driven by the promise of the huge profits which such investments breed.[122] Conversely, some scholars opine that such investment drive is fuelled not solely by hopes of profit maximization but majorly, by the desire to reap from the massive scale of production as well as the opportunity of participating in the exploitation of the mammoth natural resources untapped in some host nations.[123] Be that as it may, economic incentives bolstered by hopes of

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[121] Adeoye A.Akinsanya, *the Expropriation of Multinational Property in the 'Third World*(New York: Praeger, 1980**).** Also, Robert Z.Aliber, *the Multinational Paradigm* (Cambridge, Massachusetts: The MIT Press, 1993),at 209**.**

[122] Isaiah A Litvak and ChristopherJ. Maulc, T*he Issues of Direct Foreign Investment in* Isaiah A**.** Litvak and Christopher J Maulc (eds.), *Foreign Investnent: The Experience of Host Countries* (New York: Praeger, 1970),at 14.

[123] Chike B Onwuekwe 'Reconciling the Scramble for Foreign Direct Investments and Environmental Prudence; A Developing Countries Nightmare' [2006] 7 Journal of World Investment and Trade113.

profit maximization may be ticked off as one of the interests behind the continued investment in oil sectors of developing countries of which Nigeria is just one among many.

Moreover, the clamour for FDI by developing countries has led to incidences of liberalised tax regimes and other cut backs as moves towards competitive advantage in attracting transnational corporations; the perceived facilitators of FDI.Such incentives include reduced taxes, duty-free imports of products and machinery, accelerated depreciation or amortization, unrestricted repatriation of dividends as well as easy entrance and exit into these host nations.[124]

The obviousness of this issue is evident in the Nigerian Investment Promotion Commission Act, 1995[125] and Foreign Exchange (Monitoring and Micelle nous) Act 1995.[126] Both Acts liberalised restrictions imposed on full ownership of FDI and capital importation respectively as against the earlier provisions of The Nigerian Enterprise Promotion Act 1972 and the Exchange Control Act 1962 which had more stringent provisions. For further examples of this benefit in practice, see the tax havens islands of Jersey, Guernsey and Cayman as well as the Swiss Cantons and the Isle of Man who compromised their tax regulations in return for increased presence of foreign firms therein.[127]

1.8 Expansion of trade

However, as activities of transnational corporations diminish, owing to alternative funding sources, the globalisation of developing countries and campaigns against neo-colonialism, the idea of FDI bridled this gap as it presented an open door through which oil companies gained access to resources of developing countries as well as the political control that came with

[124] Chike B Onwuekwe (123).

[125] Nigerian Investment Promotion Commission Act, 1995.

[126] Foreign Exchange (Monitoring and Micelle nous) Act 1995.

[127] Robert Z Aliber, *TheMultinational Paradign* (Cambridge, Massachusetts: The MIT Press, 1993), at 212

it.[128]This was facilitated by promise of technology transfer and trade liberalisation, rubber stamped by endorsements from international organisations; the UN, IMF, WTO,[129]though the idea of FDI was to bridle the North-South divide, the notion of the investments of oil companies in host nations remain elusive, hence the need for further inquest and analysis. As delineated above, it could be political, economic, social or even humanitarian.

1.9 Relaxed legal regimes and tax incentives

Aside from political and economic benefits, oil companies' investment decisions in host nations as typified by Nigeria and its oil sector, may be characterised by the relaxed legal regime they hope to exploit as most laws are worded to protect interest of oil companies in a bid to retain them owing to the economic and social benefits governments of host nations suggest they enjoy through the activities transnational corporations in the exploitation of natural resources.[130] Moreover, the porosity that pervades some legislation of host nations especially in the oil and gas industry when put at par with international law and regulations presents itself as incentives which oil companies hope to zero in on.

1.10 Labour force incentive

Slightly related to the perceived economic goals of transnational corporations is the docile labour force factor. Oil companies attach weight to the level of the trade union activism in a

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[128] Edward M. Graham and Paul R. Krugman, *The Surge in Foreign Direct Investment in the 1980s*, pg 13 in Kenneth A Froot *(ed.), Foreqn Direct Investnent*.

[129] George **C** Abbott, *Debt Relief and Sustainable Development in Sub-Saharan Africa* (Cheltenham, U.K.Edward Elgar, 1993), at 26.

[130] The Nigerian Federal Government, on the other hand, has been charged with failing to enact and enforce environmental protections against oil damage by Shell and other oil companies sourced fromhttp://www1.american.edu/ted/projects/tedcross/xoilpr15.htm Oil Production and Environmental Damage by W. Corbett Dabbs (December 1996).

country before concluding on a decision to invest.[131] Oil companies generally shy away from countries with an organised labour force. They consider it pervasive to business hence the need to channel investments in nations with moderated labour force of which Nigeria ticks the box correctly.[132]

Moreover, access to cheap and available labour (skilled and unskilled) may be huge drivers for activities of oil companies in the extractive industries of developing nations. The cost of employing and flying in expatriates is saved on the one hand and the other, proffer employment opportunities to indigenous people, hence a win-win situation for both parties.

On the contrary, though oil companies may seem to find host nations as safe havens owing to the perversity and unconcerned strength of the labour force as well as low cost of labour there to, however, one would wonder how this will even out in the face of the constant conflicts that intrigue the some host nations of which Nigeria is a classic example, coupled with the huge levies and reparation imposed on oil companies as well as the fear of appropriation.[133]

The Bophal gas tragedy in India[134] and the building collapse in Pakistan as well as issues in Angola[135] can be cited to argue that the trend is the same around the world. Considering these developments, an important question to ask is the labour factor the major driver that attracts investment decisions of oil companies in the oil sector of developing countries? As in most developing countries where oil companies operate, the above issues may be considered the major interests for investments in the oil sector as well as exploration of natural resources.

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[131] Kumar (ed.), *Transnational Enterprises: Their Ipact on Tird H'Vorld Societies and Cultures* (Boulder, Colorado:Westview Press, 1980**)** 11**.**

[132] Kumar (ed.), Transnational Enterprises (n 131).

[133]*Adeoye **A*** Akinsanya*, the Expropriation of Multinational Property in the 'Ihrird World (New York:*

*Praeger, **1980).***

[134] *Adeoye **A*** Akinsanya (n 133).

[135] *Adeoye **A*** Akinsanya (n 133).

Although oil companies may have other interests or motivating factor, however a total jettison of most or all of the issues above may be considered a blatant denial of the obvious.

1.11 The host states' benefits from the exploitation of natural resources

Just as developed countries did in years counting down to and during the industrial revolution so are developing countries doing competitively today,[136]for foreign direct investment ('FDI'). However, this time it is the other way around.[137] The idea is to attract FDI into developing states with the anticipation that such investment will put them on centre stage of global economics and commerce and to solve other problems that affect the polity in developing countries, such as poverty, economic stagnation and decline of public institutions a norm. Developing countries surrender their natural resources as incentives for FDI.

In Nigeria for instance, it was upon the above belief that the countries Vision 2020[138] agenda was built owing to the anticipation and promises the country had for development and economic growth that would spill from the exploitation of oil and gas by transnational corporations. It is pertinent to explore the various expectations the state had from exploitation of its oil. Aside the common aspirations of economic growth and political stability, one may infer other ancillary expectations like technology transfer, improvement in research and development, nation building as well as integral development of the nation and its citizen base.

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[136] AE Safarian, *Governrents and Multinationals: Policies in the Developed Countries* (Washington D.C.: British-North American Committee, 1983), at 1-4; Kenneth A. Froot, "Introduction", in Kenneth A. Froot *(ed.), Foreqn Direct Investnent* (Chicago: The University of Chicago Press, 1993), at 1-3.).

[137] Developed countries in the days of the industrial revolution scrambled for and partitioned developing countries in their search for raw materials and human capital to sustain industrial activities in the west.

[138] Nigeria anticipated to be one of the 20 largest economies in the world, a position itself as a significant economic and political force globally as well as the ability to assert a leadership role in Africa.

These issues and more will be analysed below as well as the extent they have been realised assessed and impediments there to.

1.12 Socio-economic development

The rhetoric in Sub-Saharan Africa especially during the emancipation wave for independence in the 1960's was that effective exploitation of natural resources was the magic key that would open doors to economic growth and political stability of any country.[139] Like other developing countries, Nigeria opened its borders to oil companies with the aspiration that it would add to its economic development strategies.[140]In addition, given the resource base of these multinational oil companies and their enormous productive, investment and distribution capacity, they constitute genuine transnational actors on whose shoulders any developing economy aspired to the leap into the world's economic domain.[141]

Furthermore, it was the belief that oil companies through activities in the oil sector of host nations, will contribute to the governments' revenue through taxes, rates, royalties and levies[142] as well as provide employment, in the host communities where they operate which encourages spending and free flow of cash in the economy.

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[139] Adekoya Adebanji ' Environmental and Resource Conflicts in The Niger Delta: An Impediment To Nigeria's Transition to The Green Economy' (2010) 10 IAIA Conference Proceedings, Geneva see http://www.iaia.org/iaia10/documents/reviewed_papers/Environmental%20and%20Resource%20Conflicts%20in%20the%20Niger%20Delta.pdf?AspxAutoDetectCookieSupport=1 ACCESSED 22/08/2015.

[140] Titus Moser, 'MNCs and Sustainable Business Practice: The Case of the Colombian Peruvian Petroleum Industries [2001]. 29 Journal of World Development, No. 2, 291.

[141] E Chukwuma, R Anazodoh and H Nzewi 'African Underdevelopment and the Multinationals – A Political Commentary' [2011] 4 JSD, NO. 4, 101-109, 102.

[142] Tunde O *The European Community in Perspective* (Mangrove Publishers, Lagos 2011).

In Nigeria for example, the promise of oil exploration became the nation's hope for resurrection from the economic stagnation, widespread poverty and laxity in public institutions following years of mismanagement in the hands of the military.[143]With economic stagnation came other social inequalities such as impeded access to basic healthcare and social amenities, poverty and insecurity. Thus, with the discovery of oil came a glimmer of hope that Nigeria could yet still, wriggle out of its indebtedness. Moreover, it would be a calculated move towards growth and development as the new-found wealth would provide required finance for investment in infrastructure and sustainable development programmes. These measures as intended would present rapid economic transformation sustained by an efficient, cleaner and safer energy source.[144]

Also, in line with hopes of economic stabilisation are the hopes of host states buying equity stakes in oil companies. This is characterised by the fact that the initial idea was that the government entered into a joint venture (JV)partnership with oil companies typified in Nigeria with the government represented by the Nigerian National Petroleum Corporation (NNPC) of which the Memorandum of Understanding (MOU) delineates each parties rights and obligations, giving Nigeria a fair controlling share of activities oil companies in the region[145] as well as to some extent influence the investment decision making of these oil companies.[146] However, the JV arrangement was replaced by a Production Sharing Contract (PSC) as the

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[143] Okonjo-Iweala N & Osafo-Kwaako P (2007): Nigeria's economic reforms: progress and challenges. Brooklyn Global Economy and Development <http://www.brookings.edu/research/papers/2007/03/23globaleconomics-okonjo-iweala> accessed 22 August 2015.

[144] Adekoya Adebanji (n 139) 2.

[145] Arthur Anderson & Co. '*A Guide to Trade and Investment in Nigeria'* (2nd edn, Lagos 1998) 41

[146] Kumar (ed.), Transnational Enterprises (n 131).

government was always in default owing to its incessant cash calls.[147] This however limited the government's grip/intrusion in activities of oil companies but placed no obligation on the government with regards the frequent cash calls.

However, the extent to which these objectives were achieved is a different issue altogether as there are plethora of criticisms of oil companies and their economic impact on economies of developing countries, Nigeria inclusive.[148] Critics of oil companies in the oil sector of host states was of the view that oil companies counterproductive to the economic stability of host nations, with powers to bring down economies overnight[149] as well being used as foreign policy instruments of their respective home states to stall economic development in the developing countries they operate .[150] One may have to reconsider the idea of oil companies as tools of economic development if their activities destroy local entrepreneurship drive, raise capital and make it insufficient available to local firms.[151]

Oil companies have also been accused of feeding the government false information relating to their economic activities as well as repatriating profits back to their home states leaving the economies of host nations bereft of FDI.[152] This was the view of some critics who challenged the activities of multinational oil companies in the Nigeria oil sector, questioning their

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[147] ibid 41.

[148] E Chukwuemeka and others 'Africa Underdevelopment and Multinationals: A Political Commentary' (2011) 4 JSD. <www.ccsenet.org/jsd> accessed 20 September 2013.

[149] E Chukwuemeka and others (n 148).

[150] Ugwu B, 'Can Africa Survive?' (2010) International Journal of Sustainable Development 5(5) 40-48.

[151] Ugwu B (n 150).

[152] E Chukwuemeka et (n 149) 105.

rationalization as agents of economic stability[153] given that Nigeria remains underdeveloped even after of over 50 years of exploration and exploitation of natural resources by transnational corporations. If this is the case, it could be argued that the promise of economic stability from exploitation of natural resources by unachievable. However, these view does not replace the fact there were aspirations for globalization, diversification and stability of the economies of host states from takings in the oil and gas industry lead by oil companies all achievable through hopes of clean technology transfer as will be discussed below.

1.13 <u>Technology Transfer (TT) and Development</u>

In line with principle 20 of the UN Stockholm Declaration 1972,[154] host nations in return for the exploration and exploitation rights granted to oil companies and incentives put in place to attract them, expects influx of technology that would sustain economic growth and development in these nations. Moreover, the UN Conference on Trade and Development 1985 (UNCTAD) further reiterated the need for the North to South technology transfer facilitated by transnational corporations. It described technology transfer as communication of:

> …systematic knowledge for the manufacture of a product, for the application of a process or for the rendering of a service' that 'does not extend to transactions involving the mere sale or lease of goods.

such knowledge must be inclusive of all '*entrepreneurial expertise and professional know-how'* needed to commercialise the technology.[155] For instance, in Nigeria, the anticipated

[153] Izunwa. M.E. 'African Development: From History to Future Possibilities' (2005) Journal of Africa in a New World Order 2(1) 141-147. 142.

[154] The UN Confrence on Human Environment (1972) 11 ILM 1416. "This states that environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on developing countries".

[155] The first limb was established in UNCTAD, 1985 Chapter 1, para1.2. The later was a contribution by Santikarn, Miagsam Technology Transfer (Singapore University Press: Singapore 1981) 4.

technology transfer that would spill from multinational oil companies was anticipated to bolster the Nigeria's vision 2020 agenda as one of the high points of that agenda was:

> …establishing a global competitive manufacturing sector that contributes significantly to GDP with a manufacturing value added of not less than 40%.[156]

Moreover, some notable treaties further stressed the need for technology transfer through FDI. Article 202 of the United Nations Conference on Law of the Sea 1982 (UNCLOS) stressed the need for co-operation by actors in developing countries '*in promoting … the development and transfer of technology and knowledge'*.[157]Article 4.2 of the Vienna Convention on the Protection of the Ozone Layer also made mention of such transfer of environmentally sound technology 1987 (EST).[158] The *Brundtland Report*[159] towed a similar part. It placed an obligation that the promotion of sustainable development must be in tandem with the development and diffusion of new technologies.[160]

In the light of the provisions above, the importance of TT seems quite illuminated and the aspiration of such transfer into host nations (and other sectors) looking reasonable.

In the context of Nigeria, Shell among notable oil companies[161] will be singled out owing to its diversity in this sector. Shell has made some contributions to the technological development in Nigeria. However, critics argue that such developments do not stem from TT but strictly

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[156] Adekoya Adebanji (n 139) Nigeria's Vision 2020 Agenda.

[157] UNCLOS (1982) 21 ILM 1261.

[158] Vienna Convention (1987) 26 ILM 1516, 1531.

[159] World Commission on Environment and Development Our Common Future (Oxford/New York, 1987) 87.

[160] Francesco Munari *Technology Transfer and the Protection of the Environment* (Hart Publishers, Oxford) 2001, 158.

[161] Some of the oil companies in Nigeria include, Shell, Chevron, Agip, Exxon Mobile, Slum Berger, Halliburton.

their corporate social liability contribution.[162] It was further argued that though Shell had some good developmental strategies in Nigeria which focus on community development projects, road construction, rural electrification, construction of water pipelines, and donation of farming equipment. On the one hand, provision of these facilities satisfies the development interests and expectation of Nigerians but on the other hand, it falls short of the technology transfer requirement; 'productive production steps', 'application of a process', 'entrepreneurial expertise' and above all, an ability to 'commercialise'.[163]

Furthermore, TT is ostensibly hinged on the availability of personnel to use it, interpret, and apply it. Hence technology if received but not managed, is tantamount to no TT.[164] Hence the idea of TT in the Nigerian Oil and Gas sector as in most host nations seems quite illusory as this sector is a beehive of expatriate personnel who are key players in the sector.[165] Moreover, technology transfer works in consonance with research and development. However, the *Research and Development* departments of most oil companies are based at their headquarters abroad.[166] This sets one off thinking how TT is possible if this is the case. To buttress this point, Shell recently formed a JV with China's National Petroleum Corporation to develop more effective drilling techniques to be used in Nigeria.[167]

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[162] F Tuodolo 'Corporate Social Responsibility Between Civil Society and the Oil Industry in the Developing World' (2009) ACME: An International E-Journal for Critical Geographies 8 (3), 530-541.

[163] An Aplicattion of the UNCTAD Technology Transfer definition, UNCTAD, 1999a, p.203.

[164] Ugwu B (n 150).

[165] ibid.

[166] Ugwu B (n 150).

[167] Available at <https://www.shell.com/global/future-energy/unlocking-resources/drilling/well-production-line.html> accessed 16 July 2013.

Most importantly, the advent of the Trade Related Aspects of Intellectual Property Law (TRIPPS Agreement) by the World Trade Organisation made the idea of technology transfer even more cosmetic. TRIPS represented a strengthened Intellectual Property Rights which in return will pave way for developing countries to have access to the markets of the developed countries and the transfer of technology from the North to the South.[168] However, in practice, TRIPS have been met with serious criticisms. In Nigeria for example most patents in the natural resources sector are owned by the transnational corporations. If this is the case, the resultant cost of using such technology is an impediment to the perceived TT, oil companies activities should facilitate.[169]Moreover, most oil companies would rather keep host nations in the dark and completely dependent on them, than pave way for clean TT.[170]

Nigeria has enacted new law to address and is known as the *Nigeria's Local Content Legislation.*[171] This was a move to maximally sup the gains of oil companies and TT in the NOGS whereas, if there was effective and practicable TT in this sector, there would be no need for such law. This crystalizes the bickering of critics on the issue of TT and transnational corporations in operation in developing countries.

In the light of these issues, it becomes imperative that oil companies in the host states portend promises of a win-win situation that serves fuels and satisfies interest of both parties through

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168 Cameron Hutchison 'Does the TRIPPS Agreement Facilitate or Impede Climate Change Technology Transfer into Developing Countries?' [2006] 3:2 University of Ottawa Law and Technology Journal, 517.

169 C M 'Implementingthe TRIPS in the Patent Field: Options for Developing Countries' Journal of World Intellectual Property Law.

170 RI Chima and others, 'Technology Transfer and Acquisition in the Oil Sector and Government Policy in Nigeria' [2002] ATPS Working Paper Series No. 32 African Technology Policy Studies Network, Nairobi. Kenya.

171 Nigerian Oil and Gas Indusrty Content Development Act 2010 enacted, 22 April, 2010.

exploration and exploitation of natural resources in these regions. However, in practice the outcome seems rather lopsided as interests of both parties are meshed in this neverending battle of interests which ultimately, fails to satisfy the goals of either party but rather a pre-empts conflicts, court cases and exorbitant and never ending arbitration proceedings that stalls development and economic emancipation, leaving each party with weeping financial costs, which a harmonisation of these interests from the start would have helped avoid.

A discovery of the grounds of conflict between host nations and multinational oil companies especially in issues of profit maximization presupposes the need to even out these conflicts and temper it with a balance that serves the interests of all actors in the oil industry. The balancing act will not only accelerate profit both ways but will breed a stable industrial and economic climate that promotes sustainability of the business relationship and interest of the players in the business on the one hand and the environment on the other.

One may argue that the first step towards striking this balance is a realisation of both parties that the importance of the environment where the exploration and exploitation is carried out; the case of the '*golden goose that lays the golden eggs'*; host states and transnational corporations must of necessity understand and subscribe to '*promote social and environmental justice on an equal footing with corporate profits'*. This notion has been topical in corporate governance, sustainable development and international investment literature.[172] Researchers suggest that a transformation of investment treaties, arbitration mechanisms and contract models alone may not necessarily be all that is needed for the required overhaul and balance in the extractive industry of host nations; hence the need for both parties to actively work towards

[172] N Cely 'Balancing Profit and Environmental Sustainability in Ecuador: Lessons Learned from The Chevron Case' (2014) 24 Duke Envtl. L. & Pol'y F. 353-373.

better environmental justice which its realisation to a great extent, bridles an even balance of interests without jettisoning corporate profits.

To diffuse arguments that continually question the viability of environmental justice as a balancing tool, attention need be drawn to the fact that it is the responsibility of key actors in the industry to promote and protect the life, health and natural environment where they operate, and it is upon assuming these responsibilities will the eventual profits be reaped maximally and symbiotically.[173] Ecuador is an example of a host nation where responsible environmental justice succeeded as a balancing tool that tempered the seeming unending conflict and years of expensive arbitrations suits and counter suits following the activities of Chevron in the region.[174]

Enshrining the '*Buenvivr'* in their 2008 Constitution evened the inadequate institutional frameworks and the chain of errors in economic and foreign investment policies and decision making that has been the cause of conflict with Texaco- Chevron and the government of Ecuador since the discovery of oil in the country in 1967. This example comes with considerable support both globally and within Ecuador[175] and since its inclusion in the constitution of Ecuador, has helped the countries National Judicial Council resolve over 550 cases with about 614 pending settlement out of 1164 all between 2008 and 2013; and primarily between the government/host communities and Chevron.[176]

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173 ibid.

174 N Cely (n 172).

175 Joshua Partlow & Stephen Kuffer, Voters in Ecuador Approve New Constitution, Washington Post in N Cely (n 172).

176 National Judiciary Council of the Republic of Ecuador, Office of the President, Estadisticas Relacionadas Con Delitos Contra La Naturaleza in N Cely (n 172).

With the environmental justice established as the benchmark that must direct exploration and exploitation of natural resources and the rubric that pivots the relationship between transnational oil companies and host states; this realisation bring to the fore the need for a standardised legal and judicial regime that will not only ensure sustainable practices and compliance but also institutes achievable legal codes, standards and agreements which all players in the exploitation of natural resources must strictly comply with. Just as important as promoting environmental justice and standards, there is that fact of accelerating and consolidating host nation's judicial systems and redoubling efforts to ensure some stability in the legal and regulatory regimes of host states; disenable codes, principles and regulations that guide business relationship between host nations and multinational companies.[177] Instituting this, comes with it certain rewards which not only tempers conflict between actors in the oil industry but is evidently good for the business relations, ensuring stability and quality in the provision of justice, providing an optimal access to justice to all actors in the oil trade and a system of continuous improvement, modernization and strengthening of host nations mediation systems as well as the assurance of effective judicial proceedings. As window dressing to this hybrid judicial system, governments of host nations must extol meritocracy as the system of value in their judicial system through establishing professional ethics and standards.[178] These developments will not only bridle the conflicts between multinational oil companies and host nations, it goes further than that; providing an attractive economic environment for international investments[179] or as the case may be, FDI that encompasses an equitable and sustainable aspirations of all actors in the oil trade.

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[177] N Cely (n 172).

[178] N Cely (n 172).

[179] N. Cely & G. Dominguez, The Challaenges of Attracting Foreign Direct Investment for Latin America's Sustainable and Diversified Economy: Lessons Learned from Ecuador. 46 <http://nathlieceliey.fiels.wordpress.com> accessed 15 April 2015.

A lesson from this is evident in Ecuador where an overhaul of their judicial and regulatory systems was imminent following protracted cases and arbitration hearings with Chevron and the realisation that the country suffered from weak judicial and regulatory system that continually failed to address the business relationship with Chevron as well as the use of extraction technologies harmful to the environment.[180] However, equipped with a better judicial system, Ecuador not only succeeded in swaying some of the court and arbitration ruling to their favour, they also compelled Chevron submit to the principle of *forum non conviniens*hence adjudicating most cases before Ecuadorian courts.[181] As illustrated in the case of ***Aguinda v Texaco Inc, 142F.Supp. 2d 534 (S.D. NY 2001)*** where the claimants sought compensation for damages; judicial protection to remedy environmental pollution on their lands and compensation for injury to persons and property caused by pollution. The New York District court rejected Chevrons' claims and held that the case should be heard by Ecuadorian courts, ruling that Chevron must submit to Ecuadorian courts and also recognise the ability of Ecuadorian courts to decide on issues filed against the Chevron.

Rife as it is, this tempered conflict between Ecuador and Chevron that was already at breaking point at the time, hence with Chevron's recognition of the Ecuadorian judicial system's capability to deal with the complaints filed against the company and *vice-versa*, it gave the relationship the needed breath of life that was required at this stage, redefining the business relationship between Chevron and the government of Ecuador. Under the new regime, the

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[180] ibid.

[181] This decision was reached following a mass action against Texaco where 74 Ecuadorians represented the interest of over 30,000 inhabitants in eastern Ecuador and known famously as the Aguinda case (*Aguinda v. Texaco Inc*, 142 F. Supp. 2d 534 (S.D.N.Y 2001).

government of Ecuador appreciates and supports the principle that investment risks should be properly rewarded[182] and they have continued to show commitment to this.

On the other hand, there is the realisation of both parties to jointly and closely work together to renegotiate or terminate BIT's inconsistent with the principles of environmental justice, responsible democracy and human rights.[183] This renewed commitment and need for balance and stability was represented in the *Joint Declaration on Transnational Corporations and Human Rights* presented by Ecuador before the 24th Ordinary Session of the Human Rights Council of the United Nations, seeking to ensure that multinationals act within the limits of their powers and are subject to scrutiny and monitoring procedures to ensure the promotion of environmental justice and respect for human rights in countries they operate.[184]

With the lessons from Ecuador above, it is imperative that a strengthened legal and judicial regime backed with definitive and sustainable codes, practices and agreements may be considered foundational in making even the incessant conflicts between host nations and international multinational oil companies in the exploration and exploitation of natural resources. Developing countries must learn from Ecuador, strengthening their legal and judicial regime which is of essence especially in issues of reforming BITs and understanding the arbitration frameworks which will always come into play should a healthy balance of interest and aspirations be expected between multinational oil companies and the host nations in which they operate especially in developing countries.

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[182] Aguinda case (n 181).

[183] Ecuador Establishes Commission to Audit its Bilateral Inv. Treaties, ALLEN & OVERY (Nov. 13 2013), <www.allenovery.com/publications/en-gb/Pages/Ecuador-establihes-Commission-to-audit-its-Bilateral-Investment-Treaties.aspx.> accessed 12 October 2014.

[184] B Brennam, Insights into the Power of Corporations, Transnational Institute (Jan. 23, 2014), <http://www.tni.org/article/state-corporate-power> accessed 12 October 2014.

An illustration of good practice that can be borrowed from Ecuador following their difficult relationship with Chevron is explained here. Ecuador came up with some recommendations in reforming arbitration systems. Some useful points include; selecting arbitrators through transparent processes that ensures they serve solely as jurors and not as legal representatives of companies with cases before the arbitration to avoid conflict of interests. In addition, they established an institutional mechanism within the arbitration system that allows parties to appeal awards and consequently, they made it a requirement that all local remedies be exhausted before entering the arbitration system. The analysis here clearly established that Ecuador's approach might suit and address the concerns and needs of the majority of developing countries and avoids the challenges of restrictive standing negatively affects both human and the environment. Thus, the host state and the transnational corporations can jointly work together and renegotiate or terminate Bit's inconsistent with the principle of fundamental rights and environmental justice. In addition, transnational corporations operating in developing countries should respect people and environmental rights in countries they operate and the host state in developing countries should consider adopting Ecuador's template which is perceived as perfect for their particular needs.

Asymmetry to the issues above is the extent to which the activities of multinational oil companies are perceived as susceptible to external socio- political influences and disparate to domestic interests, threatening the physical, informational and cultural idiosyncrasies of host nations as well as exploitative rather than developmental,[185] leading to the appropriation wave that rocked international investment in the 70's. This has been sources of concurrent conflict with host nations especially in developing countries and common in Nigeria. Socio-political scholars theorise that the answer to this niggling trend is putting in place *an enabling policy*

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[185] A Akinsanya, Multinationals in a Changing Environment: A Study of Business-Government Relations in the Third World. Praeger, New York, 1984.

environment that foster private investment.[186]However, practical this may seem it has failed to get to the bottom of the conflict considering the nature of the economic, social and political climate of these developing countries where these conflicts brew.

One may argue that the '*enabling policy environment'* ideology helped promote liberal domestic and foreign investment policies, with government restrictions on regulated economies lifted and replaced with workable and well drafted investment codes, implemented to provide a congenial climate where foreign investment thrives making for a more interactive business relations between host nations and multinational oil companies. Be that as it may, these measures, though veritable attempts, still are yet to get to the bottom of the conflict and have failed to even out the differences held so dear by parties to this conflict in the oil industry. Leaving even the greater challenge of; what is to be done to balance these variances in perception, interests and conflicts?

In answer to the above question many legal and socio-political scholars have borrowed answers from the Corporate Social Responsibility literature. However, lessons from host nations especially in developing countries have revealed that there is only little good that corporate social responsibility (CSR) models and initiatives can do to balance these variant interests without leaving behind a trail of other issues, all fuelling the tussle for interests. It is not uncommon that CSR models of multinational oil companies breeds problems of its own in developing countries. Strategy scholars, institutional researchers as well as business ethicists reveal the struggle multinationals face in responding effectively to CSR issues in host nations where they operate[187] which commonly is the confusion on which set of standards to adopt.

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[186] CB Pratt, 'Multinational Corporate Social Policy Process for Ethical Responsibility in Sub-Saharan Africa' (1991) 10 (7) Journal of Business Ethics 527.

[187] JM Logsdon and DJ Wood, 'Global Business Citizenship and Voluntary Codes of Ethical Conduct' (2005) Journal of Business Ethics 59.

Should they develop multiple identities in the different markets they operate or rely on a single identity in guiding their CSR practices?[188] This confusion suggests CSR is far from the answer to balancing the conflict between actors in the oil industry but rather a further source of conflict. With CSR and *enabling policy environment* ruled out as balancing tools to the conflicts between host nations and multinational oil companies in Nigeria and other developing host nations. There is need to dig deeper to first unearth the background of the conflict and then proffer a solution that suggest a healthy balance of interests.

To understand the hostility and suspicion host nations have of multinational oil companies as susceptible to external influences and disparate to domestic interests comes with the realisation that developing countries by virtue of their economic disposition have basic concerns: endemic illiteracy, inadequate agricultural, animal husbandry, health and family planning programs; overburdened social-service programs; bureaucratic red tapes; untapped natural and human resources; unstable economies with insurmountable void between the haves and the have-nots coupled with dysfunctional policies which are products of internal political strife.[189] With these problems staring developing host nations in the face, they come to no other assumption than; that national development programmes of multinational oil companies are and should be designed to come to terms with these problems and effectively transform their societies. Moreover, since multinational oil companies are considered 'major forces influencing economic and cultural developments far from home and far into the future and with resources for FDI are and should be definitely, the supposed agents for the desired change host developing nations aspire for.[190] However disparate to this is the moral principle that influences

[188] L Huemer, 'Corporate Social Resposnsibility and Multinational Corporation Identity: Norwegian Strategies in the Chilean Aquaculture Industry'. Journal of Business Ethics (2010) 91: 265-277.

[189] CB Pratt (n 186).

[190] HI Schiller, *The Corporate Takeover of Public Expression* (1989) OUP, New York. 113.

actions of transnational corporations in host nations which more often than not are based on *Judeo-Christian* values, dominated by the three normative ethical theories of deontological, utilitarian and situation. It is not uncommon that most investment decisions of multinational oil companies are based on deontological ethics, acting autonomously on the basis of their reason alone and with emphasis on the whether such actions satisfy some formal conditions, duties and choices regardless of their possible consequences. This may be likened to a checklist which suggests that if all the boxes are checked then the investment decision must definitely be the needful.

Research has revealed that basing FDI in host states of the developing world on deontological ethics is generally incompatible with the socio-economic characteristics of these societies and never at par with their polity.[191] First, if effectively practiced, it emphasises the welfare of the whole group, not just that of the elite and from the perspective of this group and not that of transnational corporations. Secondly, the tenets of these ethics are consistent with the requirement that community members contribute to community welfare;[192] dousing fears of corporate philanthropy of a multinational corporation spiralling out of hand and increasing dependency from the host nations rather than reversing it.[193] This is in line with the fears expressed by socio –legal scholars that the activities of multinational oil companies have indeed created the greatest form of dependency since the end of colonialism.[194] On situation an ethics, its heritage makes it readily applicable to most developing countries environments where group decisions are based on oral traditions and group consensus fundamental to social traditions.

[191] CB Pratt (n 186).

[192] JS Mbiti, *Introduction to African Religions* (1975) in CB Pratt (n 186).

[193] B Parkan, 'On Multinational Corporations and the Provision of Positive Right' (2009) 85 Journal of Business Ethics 73-82.

[194] C Apadaca, The Globalization of Capital in East and Southeast Asia: Meaning the impact on Human Rights Standards, Asian Survey 42(6), 883-905.

Hence, considering multinational oil companies in operation in Nigeria as well as in other developing countries operate in varying and sometimes imperceptibly, cultural environments, interacting with culturally disparate ethnic groups, should they adopt situation or utilitarian ethics as the *modus operandi* it will invariably provide the required reconciliation to the social and cultural conflicts needed for effective corporate decision making.[195]

Moreover, the adoption of regional codes of conduct shifts the emphasis from establishing ambitious programs to contributing to solving social programs, which if left unsolved, affects the profitability of the corporation and ultimately, limits its survival.[196] This in essence influences the CSR strategies of multinational oil companies, targeting doable projects and taking into consideration moral initiatives consistent with the corporation's markets, products and service offerings, social environment, economy and the interest of stakeholders.[197] Taking this on board is consistent with the notion that corporations should be responsive to their host nations and that the interests of the latter should be the basis for the future direction of the corporation.[198]

Since the eventual FDI that will flow from the presence of the multinationals in the host state is tailor made to suit the socio-economic climate of that nation, it follows that investment decisions are and will be based on situation and utilitarian ethics, making all stakeholders in the industry meaningful participants in the economic activities therein.[199] This bridles the common problems of situations where development interests of multinational oil companies

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[195] CB Pratt (n 186).

[196] LJ Wilson, *Corporate Issues Management: An International View* (1990) Public Relations Review 16. 40-51.

[197] TM Mulligan Justifying Moral Initiative by Business, with Rejoinders to Bill Shaw and Richard Nunan. 9 Journal of Business Ethics 1990, 93-103.

[198] CB Pratt (n 186).

[199] CB Pratt (n 186).

are tied to that of their home countries and at variance with that of the host nation. Making the host state a consumer of the policy preferences of another sovereign nation (the transnational corporations home state), adjusting its foreign and domestic policies in conformity with the desires of dominant state.[200]

Regardless of arguments that suggest otherwise, clearly, adopting a voluntary regional code of practice will to a great extent provide ethical guidelines for the continued effective presence and involvement of multinational oil companies in the extractive industries of host nation, balancing the conflicts of interests and ensuring that both parties benefit gainfully from the proceeds and processes in the oil industry. These measures also be extended to CSR models, technology transfer as well as in contracts and agreements between the duo.

1.14 **Conclusions**

The findings have shown that there is legal framework which protect foreign investors and their investment, and the same provision is expected to confer mutual benefit for the investors and the host state but that did not materialise. As established in this chapter that the conduct of investors is not regulated in investment treaties, nor is that of the corporations. Neither in international investment treaties or local law there is no effective way of regulating the activities of transnational corporations in the host statess territories. Therefore, the BITs are regarded as one-sided which focused only on investors' protection. However, the decision from the cases discussed in this chapter in relation to arbitration established that arbitrators are challenging the conduct of transnational corporations. The chapter has established through these cases that investment treaties created certain obligations on host states and transnational corporations.

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[200] JM Rothgeb*, 'Myths and Realities of Foreign Investment in Poor Countries: The Modern Leviathan in the Third World'.* (Praeger, New York) 1989. See also CB Pratt (n 186).

The investor's obligations were derived from international principles such as principle of good faith which ensures no one benefits from his wrong action. The chapter has shown that the tribunal approaches is to strike the right balance between the host state and transnational corporations. It is further observed from this chapter that developed countries have managed to overcome the deficiency of investment treaties, they have successfully incorporated a general exception clause which allowed them to justify regulatory measures and these measures are allowed because they do not constitute indirect expropriation. On the contrary, in ***CMS v Argentina***[201] where the tribunal held that provision under BIT had been engaged and Argentina measures were considered to be in violation of investment treaties. Similarly, the tribunal held in ***Saluka***[202]that Ecuador's measures were tantamount to expropriation and the tribunal argued that principle of proportionality provides that administrative measures must be balanced against investors' interest. Consequently, this chapter has demonstrated that one of the challenges associated with investment treaties is the lack of provision regulating investors' conduct in investment treaties, but it is believed that there are international mechanisms which define the right and obligations of member states with regards to the ocean. It covers the business activities and sets out guidelines for the transnational corporations. The next chapter takes care of this and examines the duties of transnational corporations and the host states.

[201] *CMS Gas Transmission Company v Argentine Republic,* ICSIA Case NO ARB/01/8 of May 12, 2005; 44 ILM 1205 (2005).

[202] IIC 210 2006, Dutch/Czech BIT.

CHAPTER 2

DUTIES OF TRANSNATIONAL CORPORATIONS AND HOW A RIGHT BALANCE MAY BE STRUCK

2.1 Introduction

In one of the four hypotheses through which this research is underpinned, it is asked whether there is any legal nexus between environmental pollution and breach of the fundamental rights of people?In response, this chapter explores issues bordering on awareness of fundamental rights as a vehicle for environmental protection. Although little credence has been given to this aspect in the law, and this dimension should have been directly incorporated into it, particularly in Nigeria,[1] a perti

2.2 The UN General Assembly (UNGA) Resolution 1803 (XVII) on the Permanent Sovereignty over Natural Resources, 1962

The UN 1962 Resolution upholds the 'inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests[2] it also recognises the right of a nation to expropriate or nationalise the property of transnational corporations. 1962 Resolution however provided that 'the owner shall be paid appropriate compensation, in accordance with the rules in force in the state taking such measures in the exercise of its sovereignty and in accordance with international law.[3] Additionally, Miranda has further explained that transnational corporations in developing states aim to obtain maximum guarantees for the security of their investment such as promise of non-expropriation and

[1] The recently decided case of *Jonah Gbemre v Shell Petroleum Development Company Nigeria Ltd* [2005] AHRLR 151 (Federal High Court) is the first judicial pronouncement and locus classicus on the enforcement of fundamental rights to a clean environment in Nigeria.

[2] 1962 Resolution, preamble.

[3] 1962 Resolution, preamble (n 2) para 4.

legislative stability.[4] Nevertheless, the principle of permanent sovereignty over natural resources has been described as a fundamental right of states, as well as of peoples. Tyagi posits that "the principle and the right represent the resolve of developing countries to attain economic independence and to assert the authority of domestic law".[5] This provision has enabled developing country to rise up to the challenges of international monopolies because Article 21 (5) of the African Charter provides that:

> State Parties to the present Charter shall undertake to eliminate all forms of foreign economic exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their natural resources.[6]

Ideally, the principle of PSNR is commonly accepted and the right is regularly contested as discussed in chapter 1 under investor-state dispute settlement (ISDS) where Investment Tribunals prioritise the terms of International Investment Agreements over host state ability to make law. In addition, concluded that ISDS has been decried as a means of permitting foreign investors to undermine host states' regulatory powers.[7] This can be justified by the fact that developing states are exposed to traditional international law and its controversial features and procedure for the settlement of disputes with transnational corporations that were particularly a matter of host state jurisdiction. The UN 1962 Resolution was eventually introduced for a

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[4] Nicholas Miranda, Concession Agreements: From Private Contract to Public Policy, the Yale Law Journal, vol 117. NO. 3 Dec. 2007.

[5] Yogesh Tyagi, 'Permanent Sovereignty over natural resources' (2015) Cambridge Journal of International and Comparative Law 1.

[6] African Charter on Human and Peoples; Rights, OAU Doc. Cab/leg/67/3 rev. 5, 21 ILM 58.

[7] Wells Louis T, "Backlash to Arbitration: Three Causes." Chap. 14 in The Backlash Against Investment Arbitration: Perceptions and Reality (Kluwer Law International, 2010) 341.

change and it is obvious from its principle, the principle of PSNR which upholds the right of state to freely dispose of their natural resources according to their national interest.

Importantly, special features of oil and gas contracts are found in the UN General Assembly (UNGA) Resolution 1962. Resolution 1803 on the Permanent Sovereignty over Natural Resources attached some importance to the economic development of developing states and emphasised their economic independence. For example, paragraph 1 declares that

> The right of people and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.[8]

Moreover, paragraph 6 provides that international involvement or dealings should be based upon respect for the sovereignty over their natural wealth and resources and paragraph 7 clearly stated that violations of the rights under the 1962 Resolution is contrary to the spirit and principles of the charter of the United Nations and that such violation will surely hampers the development of international co-operation and the maintenance of peace.[9] In addition, paragraph 4 of the 1962 Resolution needs to be critically discussed because it provides that:

> Nationalisation, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognised as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise

[8] Paragraph 1 of the 1962 UN Resolution.

[9] Paragraph 7 of the 1962 UN Resolution.

> to a controversy, the national jurisdiction of the states and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.[10]

The 1962 Resolution has been faced with a lot of criticism and Schrijver has argued that 1962 Resolution contained a compromise between respect for national sovereignty and other rights and obligations under international law.[11] Nico further explained that the Resolution was put in place as an attempt to satisfy developing states because it referred to domestic law at paragraph 4 above on issues of compensation to be settled for compulsory-taking of foreign investment. At the same time, the resolution tried to assure developed states when reference was made to international law as well as reference to adjudication to settle disputes between transnational corporations and host states for compensation on expropriation matters. It was further argued that the 1962 United Nation Resolution created scope for a conflict interpretation and a good example is the United States declaration that in its view the word “appropriate was the equivalent of prompt, adequate and effective.” Meanwhile, 1962 Resolution only envisaged the standard of appropriate compensation not the United States interpretation. However, the US Government has maintained the position that under international law compensation must be prompt, adequate and effective. It has also been introduced and appeared in many bilateral investment treaties concluded by the United States and other BITs negotiated by capital-exporting states among themselves as well as with developing state.[12] On the other hand, Tyagi believed that the US interpretation and formulation has been resisted by the developing states

[10] Paragraph 4 of the 1962 UN Resolution.

[11] Schrijver N (1997). Sovereignty over Natural Resources: Balancing Rights and Duties (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511560118.

[12] Restatement (Third) of the Foreign Relations Law of the United States 198.

and perhaps the resistance has been the only cause the formulation has not been incorporated into multilateral agreements or been used by the international tribunals.[13]

Furthermore, the UN eventually made certain clarification on appropriate standard of treatment and international law in the subsequent United Nation Resolutions on the similar topic known as Permanent Sovereignty over Natural Resources, 25 November 1966[14] and Permanent Sovereign over Natural Resources, 17 December 1973.[15] Nevertheless, the UN effort and focus on domestic law to deal with matter of compensation in case a transnational corporation investment was expropriated continued until Charter of Economic Rights and Duties of States (CERDS) was introduced. CERDS consists of three chapters, chapter one deals with the "fundamentals of International economic relations" and chapter two addresses the "economic rights and duties of states". Meanwhile the last chapter looks at the "common responsibilities towards the international community".[16] It is important to point out that CERDS was created to address some of the injustices of traditional investment legislation and the relevant articles are discussed below. Article 2 (2) (a) of CERDS provides that each state has the right:

> …to regulate and exercise authority over foreign investment within its national jurisdiction in accordance with its national jurisdiction in accordance with its law and regulations and in conformity with its natural objectives and priorities. No state shall be compelled to grant preferential treatment to foreign investment.[17]

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[13] Yogesh Tyagi, Permanent Sovereignty over natural resources, Cambridge Journal of International and Comparative Law. (2015) page 12.

[14] Permanent Sovereignty over Natural Resources (25 November 1966) UNGA Res 2158 (XXI).

[15] Permanent Sovereignty over Natural Resources (17 December 1973) UNGA Res 3171 (XXVIII).

[16] Available at <www.http://legal.un.org/avl/ha/cerds/cerds.html> accessed on 14 October 2017.

[17] Article 2 (2) (a) Charter of Economic Rights and Duties of States, available at http://www.un.org/ga/search/view_doc.asp?symbol=a/res/3281(XXIX) accessed 14 October 2017.

It is obvious from the above provision that States were given exclusive right to regulate foreign investment in accordance with its domestic legislation and national priorities. This provision reflects the needs and aspirations of most of developing states because it will enable them to create a law that will ensure transnational corporation operates under the local law. In addition, transnational corporation business activities will be in line with domestic legislation and a breach of any local law can be easily challenged at local courts. However, the majority of developed states abstained and some voted against the CERDS, particularly, article 2 (2) (a) above, because they wanted host states to deal with transnational corporation according to what they perceived to be right in their international obligations.[18] Additionally, the developed states were against CERDS because of its provisions have empowered developing state to regulate and monitor the activities of foreign investors within its jurisdiction. Article 2 (2) (b) provides that each state has the right:

> …to regulate and supervise the activities of transnational corporations within its national jurisdictions and take measures to ensure that such activities comply with its law, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host state. Every state should, with full regard for its sovereign rights, cooperate with other states in the exercise of the right set forth in this subparagraph.[19]

The above provision was welcomed by developing states because it supported their development aspirations and ability to control the activities of transnational corporations within their jurisdictions especially, in the absence of international legal mechanism or international code of conduct to check TNCs activities. However, provision under art 2 (2) (c) of CERDS failed to meet the demand of developed states because it stipulates that every state has the right

[18] Ranjan, Prabhash, India and Bilateral Investment Treaties -- A Changing Landscape ICSID Review (2014), 419- 424.

[19] Charter of Economic Rights (n 17) Art 2 (2) (b).

to expropriate foreign investment and that states are to decide the right amount of compensation to be paid in line with their local laws. Therefore, it essential to look at Article 2 (2) (c) of the CERDS which provides that every state has the right:

> …to nationalise, expropriate or transfer ownership of foreign property, in which case appropriate compensation should be paid by the state adopting such measures, taking into account its relevant laws and regulations and all circumstances that the state considers pertinent. In any case where the question of compensation gives rise to controversy, it shall be settled under the domestic law of the nationalising state and by its tribunals, unless it is freely and mutually agreed by all states concerned that other peaceful means be sought on the basis of sovereign equality of states and in accordance with the principle of free choice of means.[20]

The above provision is contrary to the developed states request that the questions of compensation should be decided according to the principles of international law and Salacuse explained that developed states identified dangers to their economic dominance by the primacy of domestic law and as a result developed states have decided not to attach legal value to the CERDS.[21] This move has also led the developed states to promote international investment law such as bilateral treaties which grant international protection to transnational corporations and give them opportunity to enforce those rights against host states in which they have carried out their business activities. Salacuse however concluded that the precise provisions of investment treaties are not the same and some treaties put limit on host state governmental action more than others and Salacuse believed that virtually all investment treaties address the same issue.[22] While some developed countries perceive the CERDS as a fundamental departure from the traditional rules of contemporary international law , the developing states however see it as a

[20] Charter of Economic Rights (n 17) art 2 (2) (c) of the CERDS.

[21] Salacuse (n 5) 198.

[22] ibid.

legally binding instrument imposing rights and obligations on states as seen in Article 2 discussed above . It recommended the domestic law of the host state for the settlement of disputes between the transnational corporations and the host states.

Consequently, it is clear from the above evaluation that CERDS like other resolutions of international organisations are not commonly recognised as a formal source of international law. This argument can be supported by the provision under Article 38 of the Statue of the International Court of Justice (ICJ).[23] However, such resolutions can contribute to the crystallisation or formation of new customary law according to final report of the committee on the formation of customary general international law.[24] Nevertheless, the UN Resolution 1962 was accepted by the majority including the leading capital-exporting countries as well as developing countries. It could be argued that it was widely accepted due to its economic benefits and empowerment for the developing countries. Commentators such as Schrijver has also pointed out that personal sovereignty over natural resources would " give moral support to a country's democratic struggle for the control of its own means of substance, and enable the people to remain master of their own natural wealth and resources"[25] Another writer points out that resolutions advocated for a reference point to respect both national law and the role of sovereignty over natural resources and he explained further that resolutions have challenged international economic law and the unbalance relationship between developed and developing

[23] Statute of the International Court of Justice, entered into force 24/10/1945. 1 UNTS 16.

[24] International Law Association (ILA), Statement of Principle to the Formation of General Customary International Law (Final Report of the Committee, Committee on the Formation of Customary (general) International Law, Report of the 69th Conference, London 2000) 56.

[25] Schrijver, N (1997). Sovereignty over Natural Resources: Balancing Rights and Duties (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press. doi:10.1017/CBO9780511560118 at 49.

countries, and he concluded that the resolutions have highlighted the inequality of the economic system.[26]

2.3 Striking the right balance between transnational corporations and host states.

Transnational corporations have played a mixed role in global economy. Many positive impacts of foreign companies' investment in the economics of host states have been identified by the academic writers. One of the stated advantages is bringing in companies capable of low-cost and quality production. Further, evidence has suggested that they have been responsible for achievements of globalisation. For example, transnational corporations have brought many benefits attributed to globalisation, such as closing of the knowledge gap and the gap between developing and developed states. They have contributed to what is called a spill over benefits such as diffusion of knowledge and skills, faster productivity growth and higher wages.[27] In addition, these corporations have facilitated the transfer of technology, the training of human resources and expansion of trade by opening the door to the international market. It is not disputed that oil and gas exploration and exploitation have a positive effect as claimed by the scholarly articles cited here. But, on the other hand, it is argued by Arruda that the exploration activities can have environmental and social impacts for local communities due to associated problems with oil and gas industry.[28] He explains further that, the exposure to oil and gas contaminants disturb the activities and lives of communities living close to oil fields, pipelines, plants and wells. They are subject to contamination of soil, water, wildlife, livestock, air and sea.

[26] Pascale Accaoui Lorfing, the evolution of State Contracts since the 1960s, International Business Law Journal. (2017) at 395.

[27] J Bonnitcha, Substantive protection under Investment Treaties, Alegal and Economic Analysis, Cambridge Univerty Press (2014) at page 103.

[28] Gisele M Arruda, Global governance, health systems and oil and gas exploration, International Journal of Law 7 Management. (2014) at page 497.

Moreover, the number of incidents on environmental issues has established that transnational corporations are also responsible for some of the major environmental problems and disasters as a result of their exploration and production activities.[29] For example, the 1989 disaster of Exxon Valdez off the Alaskan Coast, where crude oil contaminated around 1,300 miles of coastline and affected marine life, local people and fishing activities.[30] Further, the Deepwater Horizon disaster is another mark in the history in the Gulf of Mexico. The incident which resulted in a massive oil leak after the explosion of oil rig that led to severe contamination and had adverse effect on local communities and fishing activities.[31] Similarly in Nigeria, there was oil spill in Akwa Ibom State. ExxonMobil's pipeline was reported ruptured and spilled about a million gallons of crude oil. In addition, the UK North Sea spill cannot be overlooked. An incident where an oil rig located off the eastern coast of Scotland reported leaking into North Sea and the Shell which operates the oil rig reported that the spill released 1,300 barrels of oil and spread over a 2.5 square mile area. An oil spill from a Shell platform is regarded as the worst in the North Sea in a decade.[32] Thus, if the right balance between the host states and transnational corporation can be achieved and sustained as discussed here; there is hope that the benefits will be preserved, and adverse effects mitigated.

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[29] The relevant cases are thoroughly discussed in chapter of this thesis.

[30]BBC Report, published on this day 1950-2005 avalaible at http://www.news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid4231000/4231971.stm > accessed 04 October 2017.

[31] UNEP, (2014), Environmental management in oil and gas exploration and production, at page 14, avalaible at <http://www.ogp.org.uk/pubs/254.pdf > accessed 4 October 2017.

[32] Available at <https://www.telegraph.co.uk/news/earth/earthnews/8703156/North-Sea-oil-spill-is-worst-in-a-decade.html> accessed 6 June 2017.

Chapter 1 explored the interest and aspirations behind the investment of oil companies as well as the usual aspirations of host state from exploitation of natural resources which formed the basis of how a balance may be struck between the host state and transnational corporations. However, this chapter looks at the striking balance from different perspectives and is concerned with some of the most salient issues left out in chapter 1.

2.3.1. BITs to focus in rights and responsibilities

As noted previously in Chapter 1, that BITs are important tools for the stabilisation of oil and gas contracts. BITs play vital role in the prevention of political risks and provide support which ensures oil and gas contracts are stabilised. For example, when international law is not chosen as the governing law of the contract, the use of BITs provides for the application of international law as well as help in determining jurisdiction in case of dispute between the transnational corporations and the host state. Solimene has defined BITs as:

> …an agreement made between two countries containing reciprocal undertakings for the promotion and protection of private investment made by nationals of the signatories in each other's territories.[33]

In addition, BITs provide that disputes arising out of contracts are referred to International arbitration and one of its features is the provision of the body with jurisdiction right to hear the disputes. For example, Article 25(1) ICSID Convention states that:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the

[33] Fabio Solimene, Political risk in the oil and gas industry and legal tools for mitigation, International Energy Law review, 2014 at page 5.

> parties have given their consent, no party may withdraw its consent unilaterally.[34]

Nevertheless, host states may opt out and argue that certain matters may not be referred to International arbitration according to Article 25(4) of ICSID Convention which provides that:

> Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notifies the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting 18 Convention States. Such notification shall not constitute the consent required by paragraph (1).[35]

The state may also withdraw completely from the ICSID provided they express this in writing. Venezuela denounced the ICSID Convention in 2012.[36] States are allowed to opt out, according to the provision of Article 71 of ICSID convention which states that:

> Any contracting state may denounce this convention by written notice to depositing of this convention. The denunciation shall take effect six months after receipt of such notice.[37]

It should be noted that, even where the state has not expressed its desire to pull-out from the ICISD Convention, it is mandatory that the parties concerned give a written consent otherwise the ICSID will not have jurisdiction. This provision together with investor state arbitration have been criticised by Ghouri for being unfair because the rights of foreign investors are created by

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[34] Article 25(1) ICSID Convention.

[35] Article 25(4) ICSID Convention.

[36] Available at <https://www.iisd.org/itn/2012/04/13/venezuelas-withdrawal-from-icsid-what-it-does-and-does-not-achieve/> accessed 6 June 2017.

[37] ICSID Convention (n 34) Article 71.

the rules incorporated in BITs.[38]Ghouri posits further that the rules of BITs are comparable with and stand parallel to the rules created by the domestic laws of host states concluding that arbitral tribunals should strive to balance these rights when conflicts arises between the host state and transnational corporations.[39] Article II (2) (A) of the treaty between United State of America and Argentina can be cited as an example because it demanded for "full protection and security" for investors.[40]The treaty requires that foreign investors should be protected from all acts that might cause damage or loss to their investments and the implication of this for the host state is that it can be held liable for wrong acts it has not committed.

Some agreements stipulate that present and future investments must enjoy ongoing security and protection.[41] On this point, Surya added that the host states are bound by 'chilling effect' of BITs not to implement any destructive regulations to the activities of the transnational corporations.[42] Therefore, it is important that ITA tribunals play a crucial role on matters relating to host states' sovereign powers to regulate which may cause damage or loss to the investment of transnational corporations. Tribunals should endeavour to balance between the rights of transnational corporations and the rights of host states since the primary duty of an ITA tribunal according to McLachlan includes interpretation of the treaty in a way that will provide both the procedural and substantive basis for the dispute.[43]

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[38] Ghouri Ahmad Ali. "Positing for balancing: investment treaty rights and the rights of citizens." Contemp. Asia Arb. J. 4 (2011) 95 at 97.

[39] ibid.

[40] ARG – us., art. II(2)(a), Nov. 14, 1991.

[41] Art 3 para 1&2, Treaty concluded between Chile and Belgium-Luxemburg (Economic Union) 15/07/1992.

[42] Surya Subedi, Reconciling Policy AND Principles, International Investment Law, 161-171 (2008).

[43] McLachlan, Campbell "Investment treaties and general international law." International and Comparative Law Quarterly 57.02 (2008): at 361.

One of the disadvantages of bilateral treaties is that they have focused on the rights and not on the responsibilities of transnational corporations. However, some of ITA Tribunal cases have clearly indicated that both rights and responsibilities are needed to be considered when determining appropriate compensation. For example, in ***Metalclad Corp v The United Mexican States,*** [44] the company had agreed to clean up the improperly dumped hazardous materials that have resulted in diseases and environmental pollution but failed to do so. The local authority then denied the building permit initially granted by the Mexican Secretarial of the Environment and Natural Resources. Metalclad then brought an action against the Mexican government and sued for damages under Chapter 11 of NAFTA for $90 million and the company was awarded $16.7 Million by an ICISD arbitration panel. The significant point here is that in determining the award, Tribunal only looked at the Metaclad's rights and investments but ignored its obligation to clean up the hazardous material which formed the basis of the initial agreement. Metalclad case is therefore one example of the failure of transnational corporations to live up to expectations and fulfil their responsibilities.

2.3.2. Non-discrimination

The principle of non-discrimination has been a long-standing feature of bilateral treaties and international trade relations. It constitutes a corner-stone in different fields of international law according to Nicolas.[45] World Trade Organisation explains that the principle of non-discrimination in international trade enables the function of comparative advantage because it encourages the purchase of goods from the most proficient foreign producers. It will also eliminate national discriminatory protective policy.[46] On the other hand, Hudec posits that

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[44]ICID-Award in *Metalclad Corp v The United Mexican States*, CASE No. ARB(AF)/97/1, August 30, 2000

Trading Democracy, Video, PBS (1994).

[45] Diebold, Nicolas F "Standards of non-discrimination in international economic law." International and Comparative Law Quarterly 60.04 (2011) at 831.

[46] World Trade Organisation, UNDERSTANDING THE WTO 13 (5th ed.2015).

discriminatory measures lead to “a misallocation of resources by inducing a shift of resources towards those relatively less efficient producers who are favoured and away from those more efficient producers who are disfavoured”[47] However, it is established that non-discrimination principle states that contracting parties to BITs shall not treat local market actors more favourably than foreign actors (this is known as national treatment NT), or differentiate between foreign actors by origin which is referred to as most favoured- nation treatment.

Non-discrimination obligations cover a wide range of area and it forbids indirect discrimination. In addition, non-discrimination obligations are regularly applied by international arbitral tribunals and Robert posits that the system appear to be functioning.[48]Some cases relating to non-discrimination have shown that a commitment to non-discrimination, or equality remain a critical area of international trade law.

The case of ***BP Exploration v Libyan Arab Republic***[49] involved an oil concession initially granted to an individual Mr Nelson Bunker Hunt in 1957. In 1960 Mr Hunt allocated to BP one-half of his interest, BP then became operator and carried out exploration activities in the areas and discovered oil in large quantities. The then Libyan government was overthrown and the new regime nationalised BP’s interest in the concession and the case was eventually referred to arbitration. A genuine ground for concluding that the nationalisation of the properties of the British oil company wasillegal was the fact that the court found Libyan acts discriminatory in character. Similarly, in ***Libyan American Oil Co (LIAMCO) v. Government***

[47] Hudec Robert E "Tiger, Tiger in the House: A Critical Appraisal of the Case Against Discriminatory Trade Measures." Implementing the Uruguay Round (1997): 167-212.

[48] Hudec Robert E (n 47).

[49]*BP Exploration v Libyan Arab Republic* (53 I.L.R. 297) 1973.

of the Libyan Arab Republic,[50] the Libyan government adopted the petroleum law of 1955 and granted exploration contracts to LIAMCO and the contracts were the subject of arbitration. The concession permitted exclusive rights for 50 years to discover and sell oil from certain areas of Libyan territory. In 1969, the government was overthrown, and the new regime implemented nationalisation measure which affected LIAMCO Concession agreements. LIAMCO brought an action against Libya and claimed that nationalisation measures were confiscatory, discriminatory, unlawful breach of agreement, wrongful taking and contrary to Libyan Principles of law as well as the Principles of international law. The tribunals held and confirmed that Libyan government took several measures and those measures were "purely discriminatory nationalisation, illegal and wrongful".[51]

One of the dangers of the bilateral investment treaties claimed by Stiglitz Joseph is that BITs introduced what he regarded as reverse discrimination. In addition, he believes that transnational corporations are being treated well, with greater protection, than locally incorporated firms.[52] Therefore, in order to strike the right balance, the host state should ensure they enter into BITs with utmost priority given to discrimination issues. Similarly, transnational corporations are also concerned about discrimination. Particularly, when host states unilaterally enact law that will prevent them from carrying on their business activities or passing legislation that deliberately affect the type of business transnational corporations are engaged in.

Consequently, evidence from other sectors outside oil and gas industries have indicated that discrimination occurs in many business activities and some governments encourage it in their

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[50]*Libyan American Oil Co (LIAMCO) v. Government of the Libyan Arab Republic (1977)* 62 I.L.R. 140 and (1977) 20 I.L.M.

[51] ibid.

[52] Stiglitz, Joseph E "Multinational corporations: Balancing rights and responsibilities." Proceedings of the Annual Meeting (American Society of International Law). Vol. 101. American Society of International Law, 2007at page 55-56.

internal policies. For example, Joseph has argued that all states engage in some discrimination and supported his argument with the claim that U.S government officials are required to fly in American carriers, a practice he describes as an 'implicit discrimination'.[53] The courts in America have dealt with several discrimination cases and the Supreme Court found in ***City of Richmond V Croson Co***,[54] that a measure which treated companies' differently on the basis of origin of their owners would be unconstitutional in the absence of genuine justification. Richmond case was a case in which America Supreme Court decided that a contract which set aside a programme or gave preference to local minority businesses was unconstitutional under the equal protection clause.[55]

2.3.3. Transparency and giving regards to legitimate expectations

The requirements of transparency are also important in order to strike the right balance particularly in developing states. Transparency means that the legal framework for the business activities between the transnational corporations and host states are readily apparent and that crucial decisions that may affect their dealings may be traceable back to the initial legal framework. Consequently, any attempt from either party to violate their obligations to afford transparency can be easily detected. For instance, a situation whereby the host state had failed to act in accordance with the outcome of discussions previously held with transnational corporations as highlighted in the case of ***Tecmed v Mexico***.[56] In that case, it was held that Mexico violated Article 5 of the Spain-Mexico BIT.[57] The tribunal also concluded that INE's

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[53] ibid.

[54] *City of Richmond v. J.A. Croson Co*., 488 U.S. 469 (1989).

[55] The Equal Protection Clause is part of the Fourteenth Amendment to the United States Constitution. The clause, which took effect in 1868.

[56] *Tecnicas Medioambientales Tecmed SA v. Mexico Int'l Centre for Settlement of Investment Disputes*, ICSID Case No ARB (AF)/00/2, Award, 43 I.L.M. 133 (2004).

[57] ibid.

decision not to renew the license was a de facto indirect expropriation. The tribunal then emphasised on the strict formula that a state must 'act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor'.[58] The case of ***Pope and Talbot*** [59] also exposes failure of the host state to engage in forthright communications with the investor and the tribunal held that SLD's treatment of the investment in relation to the verification review process constituted a denial of the fair and equitable treatment required by Article 1105 and found Canada liable to the investor for the resultant damages. This is also applicable where the host state fails to ensure that there is consistence between the representations made by the different organs of government with respect to the same investment as pointed out by the tribunal in the case of ***Metalclad*** discussed earlier on. The tribunal used the NAFTA's articulation of transparency as a general treaty objective to build a stringent standard of application for NAFTA Article 1105. The tribunal ruled that the article requires a NAFTA state to ensure that all relevant legal requirements must be capable of being readily known to foreign investors and that 'there should be no room for doubt or uncertainty on such matter'.[60] On the other hand, host states may not be found to violate any rules where regulations are publicised, and transnational corporations are made aware beforehand of any rules that govern their business activities. The case of ***Champion Trading v Egypt ICSID***[61] can be cited to support this point. This case was brought under the United States-Egypt BIT.[62] The claimant in this case relied heavily on the requirement of fair and equitable treatment. However, the tribunal acknowledged that transparency principle exists but held that the

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[58] ibid para 154.

[59] *Pope & Talbot Inc. v Canada, Interim award*, IIC 192 (2000).

[60] *Metalclad v. Mexico,* Award, para 76.

[61] *Champion Trading v Egypt* ICSID Case No.ARB/05/8, para 331.

[62] Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982 U.S.-Egypt, S. Treaty DOC. NO 99-24 (1986).

claimant 'were in position to know beforehand all rules and regulations that would govern their investment for the respective season to come'.[63]

It is therefore understood from all the cases discussed that transparency from perspectives of host states is integral to the maximum protection of investments. It must also be noted that few developing states have the regulatory or legal mechanism in place to give room for full transparency and investor participation and not until this is achieved, a right balance may not be struck between the host states and transnational corporations particularly in developing states.

Furthermore, the world-wide promotion of transparency for the oil and gas industries has become accepted as the right solution to weaknesses in governance in developing states. It is submitted that if transnational corporations disclose publicly their dealings with the host state government, then citizens of developing state will be able to hold a government accountable. This may eventually minimise corruption and mitigate conflicts between the transnational corporations and host states.

2.4 Duties of transnational corporations

It is established that UNCLOS III is the only agreement which successfully defines the right and obligations of member states with regards to the Oceans. It covers the business activities and sets out guide lines for transnational corporations. It is understood that efforts were made on three occasions before an agreement could be reached in 1982 which saw the birth of UNCLOS III.

UNCLOS I brought about four different conventions after a conference in Switzerland from 1956 to 1958. It was first considered as a successful effort but later revealed the crucial issues

[63] Treaty Concerning the Reciprocal Encouragement and Protection of Investments (n 62) at para 140.

that must be addressed. Areas of territorial waters were left uncovered. Efforts continued in order to fill the gap left by UNCLOS I. The aim was to have a unified convention that will cover the whole issues, therefore, another conference was held in 1960 but the participants were unable to reach any agreement due to the fact that majority of the participants were there only as allies or dependants of developed nations. They dominated the negotiations and no agreements were reached until more states were allowed to take part in their own capacities which resulted in the UNCLOS III.

Annex III, Article 4 and paragraph 4 deals with issue of exploration and responsibilities of host state. Meanwhile, UNCLOS III also stipulates direct and specific obligations for transnational corporations. This chapter examines all of these as well as international legal personality of transitional corporations and mechanism aimed at effective international regulation of transnational corporations.

2.4.1 Multinational corporations as a subject of International Law

It is important to discuss commentators' views on transnational corporations before analysing its status in international law or in domestic legislation. Kamminga has described it as a legal person that owns or controls productions, distribution or service, facilities outside the country it is based.[64] Similarly, the OECD states that transnational corporation operate in all sectors of the economy. "They usually comprise companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways.[65] However, as Dine explains that "multinational and transnational companies do not exist as an entity defined or recognised by law. They are made up of complex structures of individual companies

[64] MT Kamminga "*Holding Multinational corporations accountable for human rights abuses: a challenge for the EC*" in P Alston (ed) The EU and Human Rights (1999), Oxford University Press) 553 at 554.

[65] OECD (2011), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, OECD Publishing.

with an enormous variety of inter-relationships".[66] Meanwhile, in Jagger's view "The common feature of these large and often rather opaque corporations is that they operate across national borders. Operating in many different countries places these corporations outside the effective supervision of domestic and International law, which can result in a deficiency".[67] Jagger's view can be justified because incorporated companies under domestic law are bound by the law under which they are incorporated. This position is not the same with transnational corporations, they are made up of a network of corporations, which are incorporated in other jurisdictions, and they can operate across different jurisdictions. Ong believes that private transnational economic actors are taking advantage of increased opportunities to trade and specially to invest within different national jurisdictions.[68] He concluded that they were able to achieve this following the success of worldwide efforts at trade liberalisation and investment protection, established through international organisations such as the World Trade Organisation (WTO).[69] Another significant point to the argument presented here is the likely effect of the multi-jurisdictional nature of transnational corporations. The reason is that the ability of a host jurisdiction to control and monitor their activities may be limited to their manifest presence within that host jurisdiction. This aspect will be fully discussed later in this chapter.

Furthermore, the question of multinational corporations as a subject of international law has according to Chetail raised a longstanding and complex debate.[70] He further explained that the

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[66] J Dnie Companies, *International Trade and Human Rights* (2005, Cambridge University Press) at 48.

[67] N Jagers Corporate Human Rights Obligations: In search of Accountability (2002, Intersentia) at 11.

[68] David M Ong, Regulating environmental responsibility for the multinational oil industry: continuing challenges for international law, International Journal of Law in context 2015.page 1.

[69] David M Ong (n 68).

[70] Vincent Chetail, *The legal personality of Multinational Corporations, State Responsibility and due diligence: the way forward*, Chapter five, page110 (Cambridge University Press, 2013).

debate first arose during the 1960s in the context of nationalisation and permanent sovereignty over resources of newly independent states and recently it resurfaced in the context of their alleged responsibility in respect of fundamental rights.[71] It could be argued that multinational corporations are not a subject of international law simply because some authors consider that, in the current stage of international law, the international personality of transnational corporations remain an open question.[72] Meanwhile, the third US restatement of foreign relations law has revealed that" the multinational enterprise or corporation is an established feature of international economics life, but it has not yet achieved special status in international law or in domestic legislation".[73] It would be pertinent to highlight some of the mechanisms aimed at international regulation of transnational corporations.

2.4.2 International mechanisms regulating the activities of transnational corporations

There is no binding treaty or framework regulating the activities of transnational corporations in International law. Evidence presented above has established that transnational corporations do not have legal status in international law. Thus, some of the international instruments that focus on the activities of transnational corporations can be examined. There are two ways to look at this aspect, through binding treaties that are directed at states but can also be made applicable to transnational corporations. Good examples are Bilateral Agreements and International Labour organisation (ILO) Conventions) and measures or other law focused on the activities of the transnational corporations. The next paragraph therefore focuses on ILO's Tripartite Declaration of the Principles Concerning Multinationals and Social Policy (as amended in 200, the Declaration).

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[71] Vincent Chetail (n 70).

[72] M Shaw, *International Law* 5th Edition, Cambridge, Cambridge University Press, 2003, at 225.

[73] The Third US Restatement of Foreign Relations Law: Vol 1, 1987, 126.

2.4.3 <u>ILO Conventions</u>

The ILO contains certain rules with which transnational corporations are expected to comply with such as creation of good social policy advantage. It is envisaged that the advances made by transnational corporations in organising their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers. In addition, the complexity of transnational corporations and the difficulty of clearly perceiving their diverse operations, policies and structures sometimes give rise to concern either in the home or in the host states , or in both.[74] Moreover, transnational activities in the 1960's and 1970's were the drive that resulted in efforts to create international mechanisms for the control of transnational corporations and define their relations to host states, particularly in the developing world.[75]

TheILO Declaration was adopted in1977 to encourage the positive contribution which multinational enterprises can make to economic and social progress and to minimise and resolve difficulties to which their various operations may give rise.[76] It is also hoped that the transnational corporations would make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly and to the enjoyment of basic human rights including freedom of association, throughout the world.[77] However, the Declaration's success is tied to the co-operation amongst employers, workers organisations and transnational corporations. Consequently, the Declaration is voluntary in nature and is intended

[74] Available at <http://www.ilo.org/wcmsp5/groups/public/@ed_emp/@emp_ent/documents/publication/wcms_101234.pdf> accessed 1 April 2017.

[75] ibid.

[76] ILO Website (n 74).

[77] ibid.

to serve as a guide to transnational corporations, workers and host state.[78] Some of its relevant paragraphs are critically analysed below.

ILO Declaration at paragraph 8 posits that:

> "All parties concerned by this Declaration should respect the sovereign rights of States, obey the national laws and regulations, give due consideration to local practices and respect relevant international standards. They should respect the Universal Declaration of Human Rights and the corresponding International Covenants adopted by the General Assembly of the United Nations as well as the Constitution of the International Labour Organisation and its principles according to which freedom of expression and association are essential to sustained progress. They should contribute to the realization of the ILO Declaration on Fundamental Principles and Rights at work and its Follow-up, adopted in 1998. They should also honour commitments which they have freely entered into, in conformity with the national law and accepted international obligations".[79] Meanwhile, paragraph 12 provides that "Government of home countries should promote good social practice in accordance with this Declaration of principles, having regard to the social and labour law, regulations and practices in hot countries as well as to relevant international standard. Both host and home country governments should be prepared to have consultations with each other, whenever the need arises, on the initiative of either".[80] Also, paragraph 59 states that "Multinational as well as national enterprises jointly with the representatives and organisations of the workers whom they employ should seek to establish voluntary conciliation machinery, appropriate to national conditions, which may include provisions for voluntary arbitration, to assist in the prevention and settlement of industrial disputes between employers and workers. The voluntary conciliation machinery should include equal representation of employers and workers".[81]

[78] ILO " A guide to the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" (2002) at 4.

[79] ILO Declaration.

[80] ILO Declaration (n 79).

[81] ibid.

The commentators have exposed the weaknesses of some of the provisions under the Declaration for being reliant on thesovereign rights of states particularly paragraph 8. It has been further argued that reference to the primacy of national law weakens the Declaration according to Muchlinski.[82] His argument can be buttressed by the fact that some states have weak legal systems and therefore are unable to impose effective law or labour standards. Some asserted that it might also lead to transnational corporations feeling reluctant to improve labour standard beyond the prevailing standards in states. Eghosa also added that theDeclaration's reliance on state sovereignty allows some degree of regulatory competition in the area of labour standards and rights. Though, he believes that such reliance might be beneficial to certain countries.[83] Nevertheless, the commentators have been able to establish that the Declaration is non-binding and a set of voluntary rules agreed upon by governments, employees' organisation and employers. Thus, transnational corporations can decide not to abide by it because sanctions are not imposed on them. Notwithstanding the apparent weaknesses of the Declaration, it still amongst the mechanisms put in place to regulate transnational corporations' activities and states have all agreed that it should be applied to the operations of multinational enterprises.[84] Other international mechanisms such as the 2011 UN Guiding Principles on Business and Human Rights, the 2000 Global Compacts and the 2011 Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises cannot be overemphasised and they are examined below.

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[82] P Muchlinski , *Multinational Enterprises and the Law* (1[ST] ED, 1999, Blackwell) at 460.

[83] Eghosa O Ekhator, Regulating the activities of oil multinationals in Nigeria; a case for self-regulation? Journal of African Law (2016) page 1.

[84] P Muchlinski , *Multinational Enterprises and the Law* (1ST ED, 1999, Blackwell) at 481.

2.4.4 OECD 2011 Guidelines

The guidelines were designed and adopted in 1976 and revised in 2000.[85] They are recommendations that appealed directly to the conduct of multinational businesses operating transnational activities with the aim of ensuring their compliance with international human rights including environmental protection standards. Like other mechanisms discussed above OECD guidelines are also voluntary and non-binding. Paragraph 7 of OECD General Policies promotes self- regulation by transnational corporations. The general policies provide that enterprises should:

> Develop and apply effective self-regulatory practices and management systems that foster a relationship of confidence and mutual trust between enterprises and the societies in which they operate.[86]

However, the states adhering to the guidelines make a binding commitment to implement them in line with the decision of the multinational enterprises. Additionally, matters covered under the guidelines may also be the subject of domestic legislation and international commitments.[87] Meanwhile, one of the principles makes the guides line applicable to firms and subcontractors by its provision that;

> State-owned multinational enterprises are subject to the same recommendations as privately-owned enterprises, but public scrutiny is often magnified when a State is the final owner.[88]

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[85] Available at : <http://www.oecd.org/daf/inv/mne/oecdguidelinesformultinationalenterprises.htm> accessed 14 April 2017.

[86] OECD Website (n 85).

[87] OECD Website (n 85).

[88] ibid.

Nevertheless, the enforcement process in the guidelines have been considered as major strength. The setting up of National Contact Points (NCP) to collect information, promote the guidelines, assist in settling matters and handle enquiries on issues covered by the Guidelines.[89]

The supporters of the guidelines have argued that one of the advantages of revised Guidelines is the creation of new human rights under Chapter IV. It is established that chapter IV explain the human rights obligations and responsibilities of transnational corporations.[90] The human rights obligations of transnational corporations introduced in the Guidelines include the need to respect human rights during their operations, endeavour not to cause or exacerbate human rights impacts, find way to minimise or prevent human rights impacts directly attributed to their activities, have a policy commitment to give regard, or promote human rights, implement due human rights diligence as appropriate, and co-operate in the remediation of adverse human rights impacts to which they have caused.[91]Therefore, the current edition (2011) of the guidelines gives greater recognition to the importance of human rights addressed in the international and national sphere. For example, commentary to the Human Rights Chapter (IV) states, inter alia, as follows:

> In all cases and irrespective of the country or specific context of enterprises' operations, reference should be made at a minimum to the internationally recognised human rights expressed in the international Bill of Human Rights, consisting of the Universal Declaration of Human Rights and the main instruments through which it has been codified: the International Covenant on Economic, Social and Cultural Rights, and to the principles

[89] E Oshionebo *"OECD Guidelines for Multinational Enterprises as mechanisms for sustainable development of natural resources: Real solutions or window dressing?"* (2013) 17/2 Lewis & Clark Law Review 545.

[90] E Mujih Regulating Multinationals in Developing Countries: A Case study of the Chad-Cameroon Oil and pipeline project (2012, Gower) at 146.

[91] ibid.

> concerning fundamental rights set out in the 1998 International Labour Organisation Declaration on Fundamental Principles and Rights at Work.[92]

Consequently, the non-binding nature of the guidelines is not distinctive because they have been used to promote corporate social responsibility activities in some host states. Also, the Guidelines represent an agreement on what constitutes good corporate behaviour in an increasing world economy.[93] One commentator avers that the Guidelines could develop into a binding international law if states adhere and constantly apply them in their dealings with transnational corporations.[94]

Moreover, the views of the Critics cannot be overlooked. They argue that the Guidelines are not biding directly against the private economic actors involved, and furthermore, do not establish legal or enforcement mechanisms to hold these private actors responsible under international law.[95] This fact was based on the provision under the guidelines which states that:

> …although enterprise contributions are implicit in all of them "Several instruments already adopted by countries adhering to the Guidelines, including Principle 15 of the RIO Declaration on Environment and Development, enunciate a "precautionary approach" None of these instruments is explicitly addressed to enterprises.[96]

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[92] OECD (2011), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, OECD Publishing. Page 32 at paragraph 39.

[93] PT Muchlinski "Corporation in international litigation: Problem of jurisdiction and the United Kingdom asbestos case" (2001) 50 International and Comparative Law Quarterly 1 at 24.

[94] E Mujih Regulating Multinationals in Developing Countries: A Case study of the chad-cameroon Oil and pipeline project (2012, Gower) at 149.

[95] David M. Ong, Regulating environmental responsibility for the multinational oil industry: continuing challenges for international law, International Journal of Law in context 2015.pag2.

[96] OECD (2011), OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES, OECD Publishing. Page 45 at paragraph 68.

The guidelines therefore draw upon, but do not fully reflect any existing mechanisms or create new rules for host states' governments. Additionally, another commentator argued that the guidelines are beset by a plethora of weaknesses because he believed that the guidelines are weak in enforcement because the NCP that was previously considered are not available in many states. He added that the issues addressed in the guidelines are also minimal; also the OECD itself is an exclusive club made up of rich states and therefore excludes most states from developing countries.[97]

2.4.5 **The United Nations Guiding Principles on Businessand Human Rights (UNGPs)**

The United Nations Guiding Principles on Business and Human Rights are arguably the world standard for preventing and tackling the risk of adverse impacts on human rights associated with business activity. The Guiding Principles was endorsed by the United Nations on June 16, 2011 and is regarded as the first corporate human rights responsibility initiative to be endorsed.[98]

It is vital to point out from the outset that the Guiding Principles are not binding on transnational corporations. Nevertheless, transnational corporations may ignore them only at their risk. The Guiding Principles embody certain human rights norms that are legally binding on them under national law or international law. The Guiding Principles outline the host states duty to protect human rights and what transnational corporation should be doing to give respect to human rights as well as access to remedy if these rights are not respected. Therefore, this work critically investigates the corporate responsibility and the key principles in that regard:

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[97] E Oshionebo "OECD Guidelines for Multinational Enterprises as mechanisms for sustainable development of natural resources: Real solutions or window dressing?" (2013) 17/2 Lewis & Clark Law Review 545.

[98] Surya Deva, "Guilding Principles on Business and Human Rights: Implications for Companies".

> Principle 11 provides that "Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved"[99] … "The responsibility to respect human rights requires that business enterprises (a) Avoid causing or contributing to adverse human rights impacts through their own activities, and address impacts when they occur; (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts"[100]… "The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with severity of the enterprise's adverse human rights impacts.[101]

In highlighting the major difficulties of the key Principles above one should consider some stakeholders' views whether the UNGPs provide enough standard for businesses, contending that the transnational corporations should have an obligation to realise rights instead of responsibility. The SRSG on this point conclude that the Ruggie Principles are appealing, they do not constitute an international law, nor do they create binding legal obligations. Instead, they simply explain existing international human rights required from the states and provide information on how to implement them.[102] Thus, it remains the host states' responsibility to protect human rights, while transnational corporations only need to respect human rights. Therefore, transnational corporations do not have binding legal obligations regarding human rights at an international level and remain regulated only at a national level. Enforcement is

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[99] Guiding Principles on Business and Human Rights available at <http://www.ohchr.org/documents/publications/GuidingPrinciplesBusinessHR_EN.pdf> access on 20 April 2017.

[100] ibid principle 13.

[101] Guiding Principles on Business and Human Rights (n 99) principle 14.

[102] United Nations Special Representative of the Secretary- General, "Protect, Respect, and Remedy", UNdOC/cn.4/2006/97 (February 2006), p.12.

even more difficult at national level, especially in developing states due to the importance attached to economic growth and the idea of an international free market and as Choudhury reckons that "domestic measures are no longer sufficient to deal with corporate abuses on a transnational scale".[103]

Furthermore, other commentators argue that a lack of binding legal obligations concerning human rights at an international level has allowed the transnational corporation to continue exploiting developing states with weak regulations in order to evade their human rights obligations.[104] They argue further that transnational corporations are discernible entities at a global level, but the inability of national and internal laws to deal with these entities has resulted in a legal loophole.[105] Thus, it could be suggested that Guiding Principles needed an overarching legal status that could make the framework legally enforceable. Supporters of GPs have defended it for creating far more consensus than any other previous attempt at creating worldwide business-human rights standard and they have openly praised the consultative process for effectively bringing to light issues of human rights.[106] Additionally, GPs were welcomed for creating a distinction between the duty of states and responsibility of transnational corporations. Furthermore, transnational corporations which have opposed the binding obligations of human rights previously and against all past attempts at regulating transnational behaviour have embraced this new development.

[103] Barnali Choudhury,"Beyond the Alien Tort Claims Act : Alternative Approaches to attributing Liability to Corporations for Extraterritorial Abuses" (2005) 26 North-Western Journal of International Law & Business 43, 74-75.

[104] Chrispas Nyombi, Dr Andreas Yiannaros, Dr Rhidian Lewis, Corporate personality, human rights and multinational corporations, International Company and Commercial Law Review 2016 at page 15.

[105] Chrispas Nyombi (n 104).

[106] Susan Ariel Aaronson, Ian Higham, "Re-righting Business': John Ruggie and the Struggle to develop International Human Rights Standard for Transnational Firms" (2013) 35 Human Rights Quarterly 333, 336.

On the other hand, non-governmental organisations (NGOs) have condemned the Guiding Principles for merely imposing non-binding obligations on businesses and others criticised it for what they described as the emphasis on processes at the expense of substance.[107] Overall, international attempts so far have been ineffective and the current position cannot compel transnational corporations to behave in responsible way due to the failures of international law and as a result commentators have made recommendations that the only way to hold transnational corporations accountable for their unethical practices is to impose legal personality on them at in international level .[108]

Moreover, corporate legal personality and legal responsibility was established and recognised by the international Court of Justice in the case ***Barcelona Traction,*** where it was held that "only the company, which was endowed with legal personality, could take action in respect of matters that were of a corporate character".[109] The decision in that case was also upheld in the case of ***AhmadouSadio Diallo,*** where the Court of Justice held that "in determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law".[110] On this point, Chetail explains that the question whether the transnational corporations have international personality requires a case-by-case examination of the relevant appropriate norms of international law.[111] He explains further that

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[107] Wouters and Chane, "Multinational Corporations in International Law", Working paper NO.129 (December 2013), page 17.

[108] Chrispas Nyombi, Dr Andreas Yiannaros, Dr Rhidian Lewis, Corporate personality, human rights and multinational corporations, International Company and Commercial Law Review 2016 at page 15

[109] *Belgium v Spain* (Case concerning the Barcelona Traction, Light and Power Co Ltd) [1970] I.C.J. Rep. 3 (ICJ).

[110]Ahmadou Sadio Diallo (Republic Protection of Guinea v Democratic Republic of the Congo), Preliminary Objections, 24 May 2007 [2007] ICJ Reports 194.

[111] Chetail Vincent, The Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward (December 6, 2013). Unity and Diversity of International Law. Essays in Honour of Prof. Pierre-Marie Dupuy, page 113.

a limited and derived personality may be conferred only by three deferent sources namely and in summary, customary law, treaties and internationalised contracts usually concluded between a host state and a corporation and mostly in oil and gas industries.[112] Both treaties and customary law were thoroughly examined in chapter one and therefore the next paragraph takes care of third source, that is, internationalised contracts.

Oil and gas contracts often spell out rights and obligations of the host state and transnational corporations as well as a unique clause providing that the agreement is governed by international law. Additionally, contract must also provide for international arbitration in case of a dispute according to UNCLOS III. This fact was also established in the case of ***Texaco Calasiatic v Libyan Arab Republic***[113] where the arbitral award stated that

> In other words, stating that a contract between a state and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognised that a private contracting party has specific international capacities. But, unlike a state, the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he derives from the contracts.[114]

The above interpretation was shared by many authors and Roland Portmann explains that in the arbitrator's view, then, the choice of international law as the proper law of contract suggested that the parties to the contracts as in the case above were bestowed with limited international personality for the purposes of the contract.[115] However, Vincent disagreed and claims that such contracts cannot establish *an ergaomnes* personality but, nevertheless he

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[112] Chetail Vincent (n 111).

[113] Texaco Calasiatic v Libyan Arab Republic (Award on the Merits, 1977)53 ILR 422.

[114] Calasiatic (n 113) paragraph 47 (p.58).

[115] Roland Portmann, *Legal Personality in International Law*, Cambridge University Press (2010) page 122.

agreed that those contracts remain important legal tools in order to regulate the conduct of transnational corporations at the international level.[116] Moreover, similar provisions may be available in the aforementioned UNCLOS III. Thus, it is important to critically analyse some relevant provisions under UNCLOS III.

2.4.6 UNCLOS III

United Nations Convention on the law of the sea provides inter alia arbitration framework in case of disagreement arising from the interpretation or application of oil and gas contract between the host states and transnational corporations.

Article 137 (1) and (3) provides that:

> "1. No State shall claim or exercise sovereignty or sovereign rights over any part of the Area or its resources, nor shall any State or natural or juridical person appropriate any part thereof. No such claim or exercise of sovereignty or sovereign rights nor such appropriation shall be recognized
>
> 3 No State or natural or juridical person shall claim, acquire or exercise rights with respect to the minerals recovered from the Area except in accordance with this Part. Otherwise, no such claim, acquisition or exercise of such rights shall be recognized".[117]

It is argued that rights and obligations arising from United Nations conventions such as UNCLOS III are indirectly applied to transnational corporations; therefore, the majority of Conventions require states to make law and enforce it on transnational corporations. Thus, some of environmental and human rights provisions under UNCLOS III cannot be overemphasised.

Key provisions

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[116] Chetail, Vincent, *the Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward* (December 6, 2013). Unity and Diversity of International Law. Essays in Honour of Prof. Pierre-Marie Dupuy, page 114.

[117] Available at <http://www.un.org/Depts/los/convention_agreements/texts/unclos/part11-2.htm> accessed on 29 April 2017.

Article 139, Paragraph 1 provides that;

> State parties shall have the responsibility to ensure that activities in the area, whether carried out by states parties, or state enterprises or natural or juridical persons which possess the nationality of state parties or are effectively controlled by them or their nationals, shall be carried out in conform with this part. The same responsibility applies to international organisations for activities in the area carried out by such organisations.[118]

Article 153, paragraph 4, of the Convention must be mentioned particularly the last sentence which is relevant to this research it emphasises the states' obligation which includes *"assisting the Authority by taking all measures necessary to ensure such compliance in accordance with article 139"*[119] It could be established that a state has an obligation to take all reasonable measures to prevent substantial pollution, for instance, when a government is unable to create environmental laws. The polluting conduct can be attributed to that state and therefore, breaches its international regulations.[120]

Article 194 of UNCLOS III seeks to prevent activities that can cause pollution it is therefore pertinent to explain Article 194 (2) provision which provided that

> States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not cause damage by pollution to other states and their environment, and that pollution arising from incident or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.[121]

[118] Article 139 para 1 of the United Nations Convention on the Law of the Sea 1982.

[119] Article 153 para 4 of the United Nations Convention on the Law of the Sea 1982.

[120] J Lammers, pollution of International water course 1984 page 588.

[121] Article 194 of the United Nations Convention on the Law of the Sea 1982.

Article 194 (3) emphasised that measure taken should address all sources of pollution of the marine environment. Therefore, article 194 (3) cannot be overstated because it provided that:

> Pollution from installations and devices used in exploration or exploitation of the natural recourses of the seabed and subsoil, in particular measures for preventing accidents and dealing with emergencies, ensuring the safety of operations at sea, and regulating the design, construction, equipment, operation and manning of such installations or devices.[122]

The above provisions indicate that there is an obligation and duties on parties to UNCLOS III to ensure environment are protected. In addition, oil and gas exploration and exploitation activities fall within the category that are precluded from releasing substances that are likely to result in pollution of the marine environment. This Convention therefore makes it incumbent on host states to ensure that appropriate measures are put in place to prevent accidents and safe operations during exploration and exploitation activities.

The case of ***U.S v Mex***[123] has established that if a state has enacted the appropriate environmental law but private parties within its control or jurisdiction inflict harm upon the environment of another state, the source state has an obligation to punish the offenders. Otherwise, the state may be liable, and the polluting conduct may be attributed to the state.

Furthermore, Annex III, Article 4, paragraph 4 cannot be overstated because of its provision which deals with issue of exploration and exploitation in general sponsoring states' responsibility as stated below.

> The sponsoring state or state, or states shall, pursuant to article 139, have the responsibility to ensure, within their legal systems, that a contractor so sponsored shall carry out activities in the Area in conformity with the terms of its contract and its obligation under this convention. A sponsoring State

[122] ibid 194 (3) (c).

[123] (U.S v Mex), 4 R. Int'l Arb. Award 337.

> shall not, however, be liable for damage caused by any failure of a contractor sponsored by it to comply with its obligations if that State party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction.

The above provision was clearly explained by the dispute chambers of the International Tribunal for the law of the sea. They said “responsibility to ensure” applies “within their legal systems” were elements concerning the content of the “due diligence” obligation to ensure. Necessary measures are required, and these must be incorporated into the legal system of the sponsoring state.[124]

Furthermore, “Responsibility to ensure” points to an obligation of the sponsoring State under international law. It establishes a mechanism through which the rules of the Convention concerning activities in the Area, although being treaty law and thus binding only on the subjects of international law that have accepted them, become effective for sponsored contractors which find their legal basis in domestic law. This mechanism consists in the creation of obligations which States Parties must fulfil by exercising their power over entities of their nationality and under their control.[125]

Moreover**,** Article 235, paragraph *2 o*f the Convention provides that

> States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.[126]

[124] Seabed disputes Chamber of the International Tribunal for the Law of the Sea 2011 at 107.

[125] Seabed disputes Chamber of the International Tribunal for the Law of the Sea 2011 at 108.

[126] Article 235 para 2 of the United Nations Convention on the Law of the Sea 1982.

Under this provision host states are required to put in place, laws, rules and procedures that will govern any future claim for damages in the national court. It was also similar to obligation under Annex III Article 22 of the Convention which states that

> The contractor shall have responsibilities or liability for any damage arising out of wrongful acts in the conduct of its operation, account being taken of contributory acts or omission by the Authority. Similarly, the Authority shall have responsibility or liability for any damage arising out of wrongful acts in the exercise of its power and functions, including violations under article 168, paragraph 2, account being taken of contributory acts or omissions by the contractor. Liability in every case shall be for the actual amount of damage. [127]

Consequently, it is established from the above that states are allowed to enact law in order to deal with wrongful acts of transnational corporations. It is also established from the various guidelines discussed earlier that majority of mechanisms and frameworks to regulate activities of transnational corporation at international level are weak, voluntary in nature, non-binding and are tied to the co-operation of employers, workers and transnational corporation. Domestically, developed world have been able to address issues arising from activities of transnational corporations but it has not been easy for developing world as critically examined below.

2.4.7. National mechanisms regulating the activities of transnational corporations in developing states

Nigeria is one of the developing states that have been struggling to control the conduct of transnational corporations in relation to their exploration activities. Nigeria is the largest producer of crude petroleum in Africa and amongst largest producers within the Organisation of the Petroleum Exporting Countries (OPEC). Apart from petroleum, Nigeria's other natural resources include natural gas, tin, iron ore, coal, limestone, niobium, lead, zinc and arable land.

[127] Annex III Article 22 of the United Nations Convention on the Law of the Sea 1982.

The oil and gas sector accounts for about 35 per cent of gross domestic product, and petroleum exports revenue represents over 90 per cent of total exports revenue.[128] Nigeria enacted various laws that impact on the activities of transnational corporations in different degrees. These include human rights law, tort law, company law, criminal law and labour law, just to name a few. Despite all this legislation, so many cases have been considered under domestic mechanism such as tort law with little success as a result of inherent procedural problems according to Frynas.[129] It is further argued by Amao that there are developments in Nigerian human rights and company laws which may prove more effective in the control of transnational corporations.[130] As analysed below under the provision of S. 54 of the Nigerian Company Act 1968 which makes it a compulsory that the foreign companies should be reincorporated as a separate entity. The disadvantages of this provision were thoroughly evaluated. In addition, Foster and Ball posit that national legislation such as company law is the only way in which states control both national and transnational corporations within their jurisdictions. They pointed out that company law gives life to the stances in which a company may end the life given to it under the law.[131] The next paragraphs therefore look at the various ways in which Nigerian domestic laws have impacted on transnational corporations as well as effects of these laws for the control of transnational corporations.

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[128] Available at<http://www.opec.org/opec_web/en/about_us/167.htm> accessed on 07 May 2017.

[129] JG Frynas "Legal change in Africa: evidence from oil-related litigation in Nigeria" (1999)43/2 Journal of Africa Law 121 at 122 to 1123.

[130] Olufemi Amao, Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Hos States, Journal of African Law, 52, 1 (2008), at page 95.

[131] NHD Foster and J Ball "Imperialism and accountability in Corporate law: the limitations of incorporation as a regulatory mechanism" in S Macleod *(ed) Global Governance and the Quest for Justice: Corporate Governance* 2006, Hart Publishing, Oxford) 93 at 93- 96.

2.4.8 Local incorporation requirements as a way of regulating transnational corporations.

Nigeria makes it compulsory for foreign companies to be incorporated locally in order to bring transnational corporations under the ambit of Nigeria Company Acts 1968. Section 54 provides that:

> Subject to section 56 to 59 of this Decree every foreign company which before or after the commencement of this Decree was incorporated outside Nigeria, and having the intention of carrying on business in Nigeria shall take all steps necessary to obtain incorporation as a separate entity in Nigeria for that purposes, but until so incorporated, the foreign company shall not carry on business[132] in Nigeria or exercise any of the powers of a registered company and shall not have a place of business or an address for service of documents or processes in Nigeria for any purpose other than the receipt of notices and other documents, as matters preliminary to incorporation under this Decree.[133]

It must be pointed out that the above provision under Nigerian Companies Act 1968 is contrary to the approach adopted in the United Kingdom Companies Act 1985. The UK Companies Act simply requires that certain documents and the name and addresses of the personnel authorised to act on its behalf should be delivered to the registrar of companies for registration. Similarly, provision of the subsequent UK Company Act 2006-part 34 S.1044 TO 1059 does not required foreign company to reincorporate.[134]

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[132] “Carry on business “in this context means, unincorporated foreign company cannot continue operation or engage in any business activities until the business is reincorporated as a separate entity.

[133] S.54 of Nigeria Companies Act 1968.

[134] See S.691 Companies Act 1985 and Part 34 S.1044 – 1059 Companies Act 2006.

The disadvantages of ***S.54 of Nigeria Companies Act 1968*** cannot be overlooked. The provision has enabled the parent companies of transnational corporations to decline liability for any adverse consequence of the activities of their subsidiary, because the subsidiary has been incorporated, recognised and operated under Nigeria domestic law. The following cases have demonstrated the worrisome outcome. In ***Mobil Producing (Nig) United v Monokpo,***[135]the parent company denied liability for the problems caused by Mobil during exploration activities simply because the subsidiary has been incorporated and legally recognised in Nigeria as an entity under domestic law while in ***Shell Petroleum Development Company SPDC) of Nigeria v Dr Pere Ajuwa and Honourable Ingo Mac-Etteli***[136] the oil company was granted a stay of execution of a judgement against it for gas flaring. On this point Amao argued that S.54 provision is an unnecessary and is regarded as counterproductive[137] because Section 60 of the Nigeria Company Act enables transnational corporations to bring an action and actions can be brought against them in Nigeria in their name as well as the name of their agents. This point was also established in ***Offshore International SA v Federal Board of Inland Revenue,***[138] where Court held that a company incorporated in Panama, and had its principal office in Texas and without a place of business in Nigeria, was liable to pay tax for the business undertaken through a subsidiary in Nigeria under the Nigerian Companies Act. Thus, it could be suggested that the provision which required that transnational corporations should be reincorporated with the aim of bringing them under the ambit of Nigeria domestic law has not achieved that goal. The question whether a transnational corporation can be held

[135] *Mobil Producing (Nig) United v Monokpo* (2003) 18 NWLR (pt 852) 346 at 401.

[136] Shell petroleum Development Company SPDC) of Nigeria v Dr Pere Ajuwa and Honourable Ingo Mac-Etteli Court of Appeal, Abuja division, no CA/A/209/06, 27 May 2007.

[137] Olufemi Amao, Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Hos States, Journal of African Law, 52, 1 (2008), at page 98.

[138] *Offshore International SA V Federal Board of Inland Revenue* (1976) INTC 385.

responsible for the acts of its subsidiary under the Nigeria law was critically examined below with relevant cases.

2.4.9 The approach of Nigerian Company law to corporate groups

It is an established law in Nigeria that a holding company and its subsidiaries are distinct and separate legal entities.[139] It is also an established law that a subsidiary is not regarded as an agent of the parent company but classed as a separate legal person.[140] Theoretically, some of Nigerian case law has proven that it may be possible to bring an action against the parent company of transnational corporations to a certain degree, but enforcement is the major obstacle. The judgement in ***Akpan v Shell***[141] illustrates the challenges and hopes of public interest tort litigation in national courts. Hope in the sense that the decision which emanated from this case may be relied upon in future decisions in similar cases before domestic courts of European Union members which are subjected to EU regulations on matters of jurisdiction and applicable law in tort cases.Moreover, Article 2 of Brussels I also provides that *"persons domiciled in the Member States Shall, whatever their nationality, be sued in the Courts of that Member State."*[142]In addition, Article 7 of Rome IIprovides that;

> …the law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4 (1) [i.e, the law of the country in which the damage occurs] unless the person seeking compensation for damage chose to base his or her claim on the law of the country in which the event giving rise to the damage occurred.[143]

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[139] *MO Kanu & Sons v FBN Plc* (1998) 11 NWLR (PT 572) 116 at 121.

[140] *Musa v Ehidiamhen* 91994) 3 NWLR (pt 334) 554 CA.

[141] District Court of The Hague (Rechtbank's Gravenhage), 30 January 2013, Akpan and others v Royal Dutch Shell AND Shell Petroleum Development Company of Nigeria, Ltd, (2013) LJN BY9854 (Nertherlands) [Akpan 2013.

[142] Article 2, s 2Brussels I, SUPRA NOTE 14.

[143] Article 7 of Rome II Regulation (EC) No.864/2007.

The Akpan case above shows that parent company can be held liable for the wrongful acts and omission of their foreign subsidiaries. Akpan considers the question of whether a forum state's court has jurisdiction over violations committed abroad especially in developing states. Nigeria Farmers and Non-Governmental Organisations ("NGO") known as Friends of the Earth brought a claim against Royal Dutch Shell and its Nigerian Subsidiary in the parent company's home land, in the Netherlands Court. They sought compensation for damage caused by pipe-line oil leakage from an oil installation operated by Shell Petroleum Development Company of Nigeria. The Dutch Court overturned the lower court decision and concluded that they had jurisdiction to consider the claim brought by Akpan and NGO. Furthermore, the court directed that Shell should allow the claimants the free access to all necessary documents and information relating to the oil spills. The court further pointed out that there is "an international trend to hold parent companies liable in their home state for injurious acts of their foreign subsidiaries "and besides "on various occasions the parent company was sued jointly with its relevant foreign subsidiary".[144] Nevertheless, Ryngaert has acknowledged that Akpan's case is a typical example of partly successful transnational environmental public interest litigation in a multinational parent corporation's home state.[145]Seck also justified why she was fully in support of litigation such as Akpan and pointed out that such an action can "serve to empower the very people whom sovereignty as a construct was imagined to exist".[146]

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[144] District Court of The Hague (Rechtbank's Gravenhage), 30 January 2013, Akpan and others v Royal Dutch Shell AND Shell Petroleum Development Company of Nigeria, Ltd,(2013) LJN BY9854 (Netherlands) [Akpan 2013, supra note 3 at paragraph 4.5.

[145] Cedric Ryngaert, Tort Litigation in Respect of Overseas Violations of Environmental Law Committed by Corporations: Lessons from the Akpan v Shell Litigation in the Netherlands, McGill International Journal of Sustainable Development Law and Policy / Revue internationale de droit et politique du développement durable de McGill, 01/2013, Volume 8, Issue 2 at page 259.

[146] Sarah Seck, "Home State Regulation of Environmental Human Rights Harms as Transnational Private Regularory" (2012) 13 German Law Journal 1363 at 1385.

2.4.9.1 Compulsory Disclosure requirements under Nigerian Company Law

The mandatory disclosure requirement under Nigeria company law is perceived as an important measure to control and promote Corporate Social Responsibility ("CSR"). Prior to 1968, it was not a requirement for the company to disclose or report accounting activities. The Companies Act 1968 makes it a requirement for the companies incorporated in Nigeria to disclose with reasonable accuracy the financial position of the company. This provision has been utilised to promote the responsibility of corporation in Nigeria. Its concept is similar to the provision of British Companies Act 1948. However, the scope of financial disclosure under the 1968 Act has been updated in the current version of Companies and Allied Matters Act 1990 ("CAMA"). Section 331 of CAMA requires that:

> "(1) Every company shall cause accounting records to be kept in accordance with this section.
>
> (2) The accounting records shall be sufficient to show and explain the transactions of the company and shall be such as to
>
> (a) disclose with reasonable accuracy, at any time, the financial position of the company; and
>
> (b) enable the directors to ensure that any financial statements prepared under this Part comply with the requirements of this Act as to the form and content of the company's statements."[147]

Moreover, there is much emphasis by the critics of the above provisions that there is nothing in the CAMA which requires corporate social reporting on non-financial matters.[148]Amodu argued further that, nothing in this primary legislation requires companies in Nigeria to demonstrate the good sense of corporate social responsibilities to their stake-holders.[149]Amao also added that CAMA requirements are too narrow and regarded as being largely fixated on

[147] Part XI Financial Statement and audit Chapter 1 of the Companies and Allied Matters Act 1990.

[148] Nojeem Amodu, Regulating and enforcement of corporate social responsibility in corporate Nigeria, Journal of African Law 2017 at page page 12.

[149] ibid.

financial reporting, and that its efficacy towards promoting CSR and sustainability is in doubt.[150] This informs the recommendations that some of the CAMA provisions should be altered and its disclosure and reports expanded to include corporate social reporting and disclosures beyond strict financial matters which is designed to benefit the company's shareholders.[151]

While CAMA together with previous Nigerian company law has been regarded as ineffective and unable to address the problems of transnational corporations, some human rights issues have shown great development in that aspect. The next section discusses these developments.

2.4.9.2 Transnational Corporations and Human Rights related matters in Nigeria.

Human rights have been regarded as an important aspect of CSR in Nigeria as elsewhere in the developed world. There is evidence that the courts have been playing an effective role in promoting and protecting human rights. In the corporate context, the support of NGOs by ensuring remedies for the victims of environmental damages is apparent from several cases that involved inappropriate transnational corporations' conduct and activities within the host state. The case ***Gbemre v Shell***,[152] for example was the case that signalled the possibility of using human rights provisions for the purpose of checking transnational corporation activities in Nigeria. Prior to this case Nigerian Judges regularly honoured the economic benefits of the country over human right protection, mostly in oil and gas related matters despite the existence of the legal rights under S.20 of the constitution of the Federal Republic of Nigeria 1999 which provides that "the sates shall protect and improve the environment and safeguard the water air

[150]Olufemi Amao, Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Hos States, Journal of African Law, 52, 1 (2008), at page 101.

[151] Nojeem Amodu, Regulating and enforcement of corporate social responsibility in corporate Nigeria, Journal of African Law 2017 at page page 14.

[152] *Jonah Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd and Ors* (suit no FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005).

and land, forest and wild life of Nigeria". Meanwhile S. 6 (6) (C) of the same constitution made the earlier provision virtually ineffective. It provides that;

> The judicial powers vested in accordance with the foregoing provisions of this section – shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of (sic) omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution [under which section 20 falls.

It however means that the right under s.20 above cannot be relied upon by an aggrieved individual in a court of law. The case of ***Gbemre v Shell*** was brought under the fundamental rights enforcement procedure in the constitution of Nigeria. Mr Jonah Gbemre alleged that there had been violations of rights under the constitution that is, rights to life and dignity of the human person under section 33(1) and 34 (1) as well as provisions under Articles, 4, 16 and 24 of the African Charter. The claimants argued that the continuous gas flaring by Shell had caused poisoning and pollution of the area which exposed the people to the risk of untimely death, illnesses such as cancer and asthma just to mention a few. However, Shell opposed the case by arguing that Articles of African Charter do not create enforceable rights under the Nigeria fundamental rights enforcement procedure. The court held that the constitutionally protected rights encompass right to a clean, poison free, pollution free environment and that exploration activities of shell which resulted in gas flaring in the claimants' community engaged their rights to life and the dignity of the human person under the constitution and the African Charter. The decision indicates that it is possible to rely on African Chatter for rights which are not available under domestic law. In addition, the court ruled that provisions under the Nigeria Associated Gas Re-Injection Act (Continued Flaring of Gas Regulations) 1984 and the Associated Gas Re-Injection (Amendment) Decree no 7 of 1985, which allowed gas flaring are unconstitutional because they are inconsistent with the right to life which includes the right to a healthy environment guaranteed under the constitution. The court therefore ordered that efforts should be made to amend relevant legislations governing gas flaring to incorporate fundamental rights under the Nigerian constitution. Amao pointed out that, in Gbemre's case the human rights provision were heavily relied on for the first time in Nigeria and posits that it was a positive signal towards a significant shift in the control of transnational corporations.[153] Another important point in this case is that fundamental right enforcement procedure is much quicker than other litigation in Nigeria because the case was concluded within 12 months compared to other procedures which can take longer than 3 years in the court of first instance.[154] Meanwhile, continuing efforts of action group, coupled with the outside world for justice for the local communities have a great impact in the way that Nigerian courts make decision in environmental pollution cases.[155] For instance senior Judges have become more thoughtful of the bad attitudes of oil companies as seen in decided cases discussed in the following paragraph.

2.4.9.3 <u>The role of action groups</u>

The important of action groups on environmental issues cannot be overstated. They play fundamental roles in the regulations of the environment and practices of oil companies. Such organisations are not part of a government and are not conventional for profit business, pursuing justice and social aims. Action groups play important roles in dealing with environmental issues. Particularly, the issues of oil spillage, water and air pollution caused by the foreign owned oil companies. Their actions were successful, in some cases as a result of their solidarity and cooperation with international well-standardised NGOs. They are

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[153] Olufemi Amao, Corporate Social Responsibility, Multinational Corporations and the Law in Nigeria: Controlling Multinationals in Host States, Journal of African Law, 52, 1 (2008), at page 110.

[154] JG Frynas "problems of access to courts in Nigeria: results of a survey of legal practioners" (2001) 10 Social Legal Studies 397 page 410.

[155] JG Frynas, Journal of African Law, Legal Change in Africa; Evidence from Oil related litigation in Nigeria, 43 (2) (1999) page 122.

independent from government and do not rely on any business support. In Africa the majority of the action groups are formed by the indigenous citizens who themselves have suffered from bad practice and ill effects of oil company's negligence. Williams commended the NGOs efforts and affirming that "action group have changed the way companies think about their strategies, changed social perspective in which companies operate, changed the norms of appropriate industry action with regards to some questions such as protection for the environment, arrangement for the pipe line security as well as financial arrangement with host state".[156]

An action group has successfully won an action against the Federal Government of Nigeria in the case of ***Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria***[157]where it was alleged that the Federal Government of Nigeria took part in oil production through Nigeria National Petroleum Development ('NNPC') in association with Shell Petroleum Development Corporation in which NNPC held 55% of the share. NGOs alleged that the Oil companies carried out oil exploration in Ogoniland Nigeria without respect for the environment and the health of villagers and as a result of oil activities they had contaminated the area and disposed of toxic wastes into water ways which eventually caused health problems and environmental degradation. Oil companies have also failed to develop and maintain appropriate equipment that would have prevented the poisonous wastes from spreading to the villages. It is further alleged that Nigerian military engaged in military operation including killing people, burning and destroying of houses and food.

[156] Cynthia Williams, Civil Society Initiative and Soft Law in the Oil and Gas Industries, 36 N.Y.U J. Int'l & PoL 2004 Page 461.

[157] Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication NO 155/96, Africa Commission on Human and people's Rights available at <http://www.umn.edu/humanrts/africa/cases/155-96b.html> accessed 16 August 2015.

The African Commission on Human and People's Rights held that Nigeria had violated the African Charter on Human and People's right. Nigeria was found to have breached a majority of the Article's Rights including Article 2, the right to enjoy Charter's guaranteed rights and freedom without discrimination, Article 4, the right to life, Article 14 the right to property, Article 16, the right to health, Article 18(1) the right to housing, Article 21, the right of people to freely dispose of their wealth and natural resources. Also Nigeria was found to have violated Article 24 which provides the right of people to enjoy satisfactory environment favourable to their development.[158]This case served as a precedent for enforcement of cultural, economic and social rights within the international community, and for the Nigerian government this case sends a clear message that environmental action group can force their way to the very highest level to have their case heard if ignored by the state. Thus, it could be argued that NGOs have called into question the purpose of state authority and oil and gas industries. They have made government in developing countries aware that environmental issues should be addressed promptly.

Furthermore, academics have advocated that action groups'pressure on transnational corporations can be used to keep transnational corporations in check and might lead to an improvement in their operations and that best practices could emanate as a consequence.[159] This argument can be supported with a successful action of a group of women against the oil companies in Nigeria which was broadcasted and reported across globe. The women stormed several oil and gas companies' premises including Chevron and Texaco in Niger Delta. They threatened to undress and remain. Action such as this is considered in Nigeria as a taboo, something forbidden and can only be used to express anger and displeasure in an exceptional

[158] Dinah Sleton, Decision Regarding communication 155/96, the American Journal of International Law, vol.96.NO.4 Oct 2002.

[159] E Oshionebo Regulating Transnational Corporation in Domestic and International Regimes. An African Case study (2009 University of Toronto Press) page 89.

circumstance. Indeed, their action put more pressure on oil companies as they eventually entered into a negotiation which resulted in oil companies promised to develop the community.[160] As noted by the Evaristus "the transformative potential of civil society has effectively forced oil industries operating in Nigeria to review and improve their operational practices especially in regard to negotiation and consultation with local people".[161] Thus, human rights violations by the transnational corporations have been challenged by the individuals and local communities with tremendous support from non-governmental organisations (NGOs). For example, in ***Shell v. Isaiah***[162] the court awarded compensation for environmental damages against Shell amounting to 22 million naira which was equivalent to $1million back in 1997. Also, in ***Edamkue & Others v. Shell***[163]the Judge awarded 245-million-naira equivalent in US dollar $1.9 million in favour of the Plaintiffs. In addition, Shell was ordered in 2005 to pay $1.5 billion to some affected communities. This trend is also seen in **Gbemre v Shell** [164]discussed above where High Court judge declared gas flaring illegal and ordered that it should be stopped immediately.

2.5 Conclusions

It is clear from above cases that the Court's attitudes have changed towards the oil companies particularly on human rights violations and environmental pollution. In addition, it has been established that efforts have been made to regulate the transnational corporation at both national and international level but some of the mechanisms are non-binding and voluntary in

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[160] BBC News, Women storm Nigeria oil plant available at <http://news.bbc.co.uk/1/hi/world/africa/2118097.stm> accessed 27 May 2017.

[161] Evaristus Oshionebo. Transnational Corporation, Civil, Society Organisation and Social accountability in Nigeria oil and gas industry, Africa Journal of International and Comparative Law 2007.

[162] *Shell v Isaiah* [1997] 6N.W.L. R PT 508.236.

[163] *Edamkue & Others v. Shell* Suit NO FHC/PH/84/&85/94 28-06-1999.

[164] *Jonah Gbemre v Shell Petroleum Development company Nigeria Limited* FHC/ B/C5/53/05.

nature. Nevertheless, states are allowed to enact laws in line with international laws to address the challenges faced from the activities of transnational corporations.

However, examining some of the inhibiting factors in developing countries has shed a degree of light on the lack of initiative on the part of the host state. The case of Jonah discussed above clearly proved that governments in developing countries preferred economic growth to environmental problems resulting in nonchalant attitude. Lack of effort to acquire modern technology and train experts in oil exploration were among the reasons that forced the Africa leaders to rely heavily on favour of foreign oil companies in order to generate revenue. Consequently, environmental issues are thoroughly discussed in Chapter 5 of this research.

CHAPTER 3

CERTAIN FEATURES OF OIL AND GAS CONTRACTS

3.1 **Introduction**

Traditional international investment law carried some controversial features, particularly in the oil and gas industries. For example, concession agreements which proved to be unfavourable to the interests of the developing states. Oil and gas concession agreements have evolved since their inception in the 1859 as one-sided contracts when majority of the resource-rich states of today were colonies of other states. This chapter investigates the opinions from literatures which suggest that one of the reasons for the lack of success of international arbitration in settling investment disputes can be linked to the fact that efforts were made to tie up the developing countries' resources sectors by unequal contracts such as concession agreements and the role which international arbitration played in creating atmosphere in favour of the transnational corporations.[1] Some of the features of oil and gas will be thoroughly discussed because efforts to justify the best types of oil and gas agreements have led to controversial debates. The issues of granting exclusive rights to transnational corporations to explore oil for long-period is seen as a major problem under old concessions and was later replaced with the modern concessions which addressed the concerns of large geographical locations linked with the old concessions. In addition, the joint venture emerged and was regarded as the best options simply because it gives the host state greater control over oil and gas exploration activities. However, this chapter examines its features, advantages, disadvantages and several factors to be considered by the host state before adopting this type of exploration agreement. Lack of funding by the host state due to imbalance in financial capacity among partners is identified as major challenges which have prompted countries from the developing world to explore other options such as Service Contract and Production Sharing Agreement. Under a Service Contract, Transnational corporations are strictly under obligations to explore oil fields in return for prearranged fees without profit sharing and with no control over the final product. The chapter discusses motive behind this type of agreement and what the host state stand to gain for paying the transnational corporations to extract the oil and be asked to leave eventually. This type of agreement was once labelled by an academic writer as economically inefficient and prone to

[1] M Sornarajah, 'The Climate of International Arbitration' (1991) 8 No 2 J Int Arb 47 at 50.

potential loss, [2]whilst its supporters claim that it is simple to manage due to its provision for tax and royalty. [3] In this regard, the current chapter sheds some light on all types of oil and gas agreements including Production Sharing Agreement (PSA) which is the most preferred type of oil agreement. It is arguing that PSA model is majorly accepted due to opportunity accorded to the host state to uphold national ownership of produced oil and at the same time the transnational corporation under this type of agreement will inject capital and bring technology with experts to explore oil fields. However, the lack of financial burden for the host states before, during and after the exploration activities have been pointed out as one of the advantages of PSA. Thus, this chapter explains Production Sharing Agreements in the Nigerian context and looks at some of the examples around the world to analyse its features particularly the provision of Local Content (LC) which developing countries have been using as a vehicle to create job for their citizens. It has led to various inputs from academic writers around the world as one commentator argues that LC should never be inspired by nationalist movement or policy choice on political motivations.[4] She posits further that allowing foreign participation may be a good chance for the developments in the host states and it can be a success if the right balance is struck. But Njamasi disagrees and maintains that foreign participation kills local companies and cited unhealthy competition from foreign investors as an example to buttress his point.[5] Nevertheless, the chapter critically evaluates LC within the national policy and its benefits for the Nigerians before comparing a PSA to other types of petroleum agreements.

3.2. The Identification of Oil Agreements

It is affirmed that oil and gas contracts involve three parties: the host state, which owns the mineral resources, provides and executes oil and gas contracts with transnational corporations; the transnational corporations which provide the capital, personnel and technology with the anticipation of making reasonable gain from their investment and lastly the host community

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[2]Smith, E.E., Dzienkowski, J.S., Anderson, O.L., Conine, G.B., Lowes, J.S., and Kramer, BM, *International Petroleum Transactions*, 2nd Edition, (2000) at page 512.

[3]Berry Claire Asiago, *the regulatory rationale for local content requirements in the petroleum industry*, International Energy Law Review, at 234.

[4] ibid.

[5]SS Njamasi, *The role of the law in the conduct of Foreign Direct Investment in a Developing Country: A critical Study of the Role of the law in the conduct of Foreign Direct Investment in Tanzania* (University of Dar es Salaam, 2011) page 100.

which is the third party to the contract and has certain development expectations from petroleum exploration activities. However, the host community is regarded as a non-contracting party with scant legal standing and this is why, Emeka has emphasised the need for host community recognition with the justification that “without the host state, transnational corporation clearly lack the legal right to operate; without the host communities, similarly they lack the social license to operate”.[6] He believes that while the relationship with the host state is governed by law, it is the relationship with the host communities which lacks a legal or regulatory basis that is capable of causing serious challenges to the transnational corporations.

Efforts to identify the main types of petroleum contracts have raised so many controversial arguments with a conclusion by academic researchers[7] that there are four types of contracts in petroleum exploration and exploitation activities. These include; the concession contract, the joint venture contract, the service contract and the production sharing contract.

3.2.1. Concession Agreement

Historically, the most popular type of contract was the concession. The concession agreement grants a private oil company the exclusive right to explore, extract, produce and market final product of natural resources. As briefly mentioned in Chapter 2, there are two types of concession agreements; the old concession and the modern concession. There are two types of oil concession agreements, the traditional concession agreement and the modern concession agreement. The old concession usually grants International Oil and Gas Company’s exclusive

[6] J Nna Emeka, Beyond petroleum production to community development: International Oil Companies as Proxy Governments, Texas Journal of oil, gas energy Law vol.5 No. 2 at 324.

[7] Hossain K. Law and policy in Petroleum Development: Changing Relations Between Transnational and Government. New York & London: Nichols Publishing Company (1979), Waelde T. W. & Beredjick, N, Petroleum Investment policies In Development Countries. London, United Kingdom (1988) Johnston, D. International Petroleum Fiscal System and Production Sharing Contracts, (1994) Taverne, B. G. Petroleum Industry Governments: A Global Study of the Involvement of Industry and Government in the Production and Use of Petroleum, Kluwer Law International, (2008), Machmud, T. N. The Indonesian Production Sharing Contract: An investor’s perspective, Kluwer Law International (2000).

right to explore and export oil for a lengthy period. A good example was the concession concluded in 1925 between the Iraqi governments with the Turkish Petroleum Company (TPC) concerning the oil field of Baba Gargar for 75 years. Meanwhile, the modern form of agreements only grant exclusive rights from a specified area for a fixed period.[8] Concession was defined by Blimn as a "contract whereby a transnational corporation is granted the right to explore and exploit oil and gas in an exchange for the payment of overall costs and taxes associated with the exploration activities". [9] Similarly, K.S. described the oil concession as a system by which the host state grants the petroleum company the exclusive rights to explore and produce hydrocarbons in an allocated area of land for a certain time, in an exchange for payment of taxes and royalty.[10] Evaluating these definitions, one can conclude that the concession agreement simply means that the host state is not the owner of the final product, that is, petroleum, once it has been extracted. In addition, many concession contracts between developing states and transnational corporations have failed to produce anticipated gains for the developing states. It failed partly because the agreements were construct as traditional matters of public policy owing to their economic focus and development aspirations. For example, Brazil has adopted three contracts model over the years. The service contract was adopted in 1975 and Brazil later changed into the concession regime in 1979 and presently utilizing Production Sharing Agreements (PSA). The changes were due to the fact that the aforementioned service contract failed to produce positive results owing to currency fluctuations associated and a drop-in petroleum price. Meanwhile, it is certain now that oil will

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[8] Brazillian concession.

[9] Blimn, K. W. *International Petroleum Exploration and Exploitation Agreement: Legal, economic and policy aspects*. (London 1986).

[10] LLP, K. S. "An Introduction to Upstream Government Petroleum Contracts: Their Evolution and Current Use." OGEL 3(1), 2005.

be found, and the concession was suitable at the time because back then it was not guarantee that petroleum would be discovered.

Furthermore, many of the old concessions have been unilaterally changed when the states became aware that the old concession agreements, they had signed were mostly favourable to the transnational corporations. They had given transnational corporations exclusive rights to search for oil, and when discovered, a further right to extract and exploit in exchange for royalty payments which were often little by comparison with the transnational corporations' gain. The old concession agreements were regarded as unbalance because of their lengthy duration and the large areas involved. This was the reason for states move to challenge the concession agreements following the decolonisation movement in the 1960s. It led to the modification of the concession agreements; particularly, clauses which were perceived as too broad and, in some cases, states unilaterally changed them. States were capitalising on the provision of Principle of Permanent sovereignty over natural resources (PSNR) contained in the 1962 Resolution. As Schrijver says "the main drive of PSNR was to promote the economic independence of developing states through the nationalisation of natural resources previously under the control of transnational corporations". [11]

Evidence has shown that the new concession will surface when it became apparent that the old concession was unfavourable to the interest of host states. For example, it was established that the Kuwait government was paid small sums for the rights over its natural resources in the concluded oil concession of 1934 between the state of Kuwait and the Kuwait oil Company

[11] Schrijver N (1997). Sovereignty over Natural Resources: Balancing Rights and Duties (Cambridge Studies in International and Comparative Law). Cambridge: Cambridge University Press.doi:10.1017/CBO9780511560118.

Limited (United Kingdom).[12] Additionally, the old or traditional concession was known to be very broad in terms of lengthy duration and large geographical area. Article 1 of 1934 Kuwait Oil concession can also be cited as a good example to illustrate this point because the contract was to last for 75 years with the oil company given wide freedom in controlling its exploration activities.

In the same vein, the 1933 concession concluded between the Saudi Arabia King and Standard Oil of California required the oil company to pay only 50,000 pounds of gold to the King for a concession which covered 500,000 sqm for a period of sixty-six 66-year.[13] Similarly, in 1939, Abu Dhabi concluded a concession agreement which granted a consortium of five oil companies the right to carry out exploration activities across the whole country for 75 years. It is obvious from these examples that the old concession agreements may be classed as one-sided contracts which benefitted only the foreign oil companies. Foreign companies were granted development rights to cover the entire country and for up to 75 years period, with no host state involvement in exploration and exploitation activities except the right to receive gold in exchange for their natural resources. However, the development of modern concession agreements has addressed these aspects. The emergence of the Organisation of Petroleum Exporting Countries (OPEC), expropriations after nationalisation, the renegotiation of contracts, as well as the creation of the International Economic Order have made it possible to remove many of the unfavourable features found in old concession. For example, in Nigeria, a concession contract was granted to Shell D' Arcy in November 1937 to explore, produce and market petroleum resources throughout Nigeria without limitation in terms of duration and

[12] Article 3 (d) of Oil Concession 1934.

[13] 29 May 1933 Oil Concession concluded between Standard Oil of California and Saudi Arabia. Further details available at<http://the-saudi.net/business-center/aramco.htm> accessed on 22 November 2017.

geographical location. [14] Oil and gas operations effectively started in 1956 and this continued for a very long time until Nigeria became a member of OPEC in 1971 and took over the control of its oil and gas exploration activities in accordance with the OPEC member's guidelines.

Modern concessions like traditional concession, grant exclusive rights to the multinational oil companies (MOC) to explore, extract, produce and market the natural resources. However, it is important to distinguish the modern form of concession from the old one. In modern concession, multinational oil companies are no longer permitted to cover large geographical area during exploration activities. In addition, the lengthy period that was previously afforded to MOC is relatively reduced to reasonable period and majority of newly concluded concessions are based on joint and shared responsibilities between the host state and transnational corporations. Some OPEC members have renegotiated old concessions and replaced them with profit-sharing agreement. The terms of modern concessions vary depending on state involved and the type of petroleum projects as these would determine what the best is for the parties. Importantly, the new concessions have made it possible for the host states to request that unexplored land should be handed back to the government and so MOC cannot leave land unexplored for long periods. Similarly, with the new concessions, transnational corporations cannot expect to be granted exclusive rights to explore over an entire country's geographical location.

Evidence has proven that the modern contracts have rebalanced issues that were regarded as excessive in the traditional concessions. For example, ***Article 4 (a) of Petroleum Working Contract Between Indonesia and P.T. Stanvac Indonesia 1964*** addressed most of the issues

[14] Available at< http://www.nnpcgroup.com/NNPCBUSINESS/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx> accessed on 22 November 2017.

discussed here. The contract stipulates that the oil company was given only six (6) months to commence exploration activities and maximum of 8 years for other related oil exploration matters.[15] This is equally observed in the concessions contract concluded between Egypt, the Egyptian General Petroleum Corporation and Esso Egypt Inc. United States.[16] The contract dictates the exact amount of money to be spent in the project and the oil companies were given a total of twelve (12) years for exploration activities.

In conclusion, it is observed that modern concessions deal very well with the concerns of large geographical locations associated with old concessions, with territory now been carefully allocated in form of oil blocks. The issue of exclusive rights granted to the transnational corporations to search and produce resources for up to 75 years as discussed in Kuwait's old concession above has also been addressed because the modern concession only allows limited contracts with the avenue to extend it if deemed necessary and productive. But if no resources were discovered, contract will come to an end within 12 years of its first award as seen in the Egyptian contract discussed above.[17] In addition, the modern concession creates job opportunities for the citizen of host state because transnational corporations are being required to employ them during their exploration activities and host state can now exercise control over the employees brought from abroad by transnational corporations. Above all, the host state now receives royalties according to the value of produced resources because new concessions require that they should be well informed and updated on exploration activities and key decisions are collectively made.

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[15] Article 4 (a) of Petroleum Working Contract Between Indonesia and P.T. Stanvac Indonesia 1964.

[16] Article IV (Egypt-Egyptian General Petroleum Exploration Corporation/Esso: Concession Agreement for Petroleum Exploration and Production 12/14/74.

[17] ibid.

3.2.2. Joint Venture Agreements

A joint venture happens when two or more parties in the oil industries enter into a relationship with a view to making profit.[18] It is important to draw a distinction between a business partnership and a joint venture. In a partnership, both parties involved operate jointly and share profits jointly. While in joint venture, there is a joint interest in joint operation, but profits are shared according to the level of participation and contribution to the joint operations. [19] In addition, the liability of a joint venture is not joint unlike a partnership in which both parties are jointly responsible for the business liability. JOA parties can sell their share of the petroleum separately to make profit. Therefore, in JOA, joint relationship means joint investment in production. It does not mean joint sharing of profit while profits and liability are shared equally in partnership business.[20] Importantly, in Nigeria the JV's arrangement means joint ownership of license, shared capita and reward, joint funding obligations, risk and liability are split and above all, each party to the joint venture pay separate tax liabilities. However, the benefit of the JV for the host state cannot be overlooked. Under JV, the host state is not alone in terms of responsibility for exploration activities and decision making. The host government will benefit from the expertise of transnational corporations and share the profits on top of royalties and taxes already generated.

This type of contract is known to be a good option for the host state. Cotula posits that joint venture contract provides the host state with a greater control over petroleum exploration

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[18] Scot Style, "Joint Operating Agreement" in G. Gordon, J. Paterson, E. Usenmez, Oil and Gas Law, Current Practice and Emerging Trends (Dundee University Press, 2012) page 368.

[19] See UK JOA 2009 Model which states that it depended on their contribution to the joint venture.

[20] Taverne, B. G. Petroleum Industry Governments: A Global Study of the Involvement of Industry and Government in the Production and Use OF Petroleum, Kluwer Law International, (2013), 3rd edn, at 365.

projects.[21] However, there are several factors to be considered by the host state before adopting the joint venture model of contract. Such factors include technical aspects, funding for the petroleum projects as well as opportunity to spread and reduce the risks associated with petroleum exploration particularly, political unrest in developing countries and environmental risks. Each of these considerations usually form the host state's motive behind joint venture contract.[22]

In every joint venture, a transnational corporation partners with the host state's national oil company to explore, extract, produce and market natural resources through a joint operating agreement (JOA).[23] Styles has defined JOA as a framework which defines the proportionate interest of the parties and also a functional document that explains the relationship of the parties under an appropriate license.[24] In addition, the national oil company is the owner of the mineral resources, while the transnational corporation only operates and in some cases, provides the funding for the project. It is a common practice that when one or more oil companies are party to a petroleum licence, they tend to rely on operating agreement to govern their exploration activities. Joint Operation Agreements are being used in a number of countries worldwide. For example, a joint operating agreement between British Petroleum (BP) and Imperial Oil Resources Ventures Limited (IORVL)/ExxonMobil Canada Ltd (EMCL) was concluded on 02 August 2010. These three oil companies had formed a joint venture to explore for oil and gas in Canada's Beuafort Sea. Exxon and Imperial each held a 25% share in the joint venture and

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[21] Cotula, L., Investment Contracts and sustainable Development; How to make contracts for fairer and more sustainable natural resource investment, First ed. (2010).

[22]Taverne, B. G. Petroleum Industry Governments: A Global Study of the Involvement of Industry and Government in the Production and Use OF Petroleum, Kluwer Law International, (2008) at 365.

[23] Mirian Kene Omalu, Developments in Petroleum Exploration and Production Arrangements in Nigeria, 14 oil & gas L Tax IN REV.7070 (1996).

[24] Scot Style, "Joint Operating Agreement" in G. Gordon, J. Paterson, E. Usenmez, Oil and Gas Law, Current Practice and Emerging Trends (Dundee University Press, 2012) page 363.

were in control of explorations. Meanwhile BP held the remaining 50% share.[25] Similarly in the United Kingdom, the 2009 JOA model is the legal documents which govern joint venture operations.[26]

In Nigeria, the joint venture model is primarily used in onshore and in shallow water operations.[27] The petroleum exploration and production activities are majorly operating under Joint venture between transnational corporations and the state national oil company, Nigeria's National Petroleum Corporation (NNPC). Nigeria's JVs also rely on JOA to govern the exploration activities. JOA provides that partners will share the cost of operations and one party will be selected as the sole operator. In Nigeria, the NNPC reserved the right to become an operator.[28] The operator prepares proposals for programme of work and joint budget of expenditure annually, which will be shared according to the number of shares.[29]

There are currently six joint ventures in Nigeria involving Shell Petroleum Development Company of Nigeria Limited (SPDC), Chevron Nigeria Limited (CNL), Mobil Production Nigeria Unlimited (MPNU), Nigerian Agip Oil Company Limited (NAOC), Elf Petroleum Nigeria Limited (EPNL) and Texaco Overseas Petroleum Company of Nigeria Unlimited (TOPCON). Theses foreign owned companies are in joint upstream operations with NNPC and they are operating mainly in the onshore Niger Delta, coastal offshore areas and recently in the

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[25] Available at <https://www.energy-pedia.com/news/canada/exxon--bp-and-imperial-oil-form-joint-venture-to-explore-canadas-beaufort-sea> accessed on 13 November 2017.

[26] For further details of the model clauses, see P. Mandler, "New Oil and gas UK Standard joint Operating Agreement" (2008) I.E.L.TR 118.

[27] Stephen Onyejose, Recent Developments in Texas, United States, and international Energy Law, Nigeria: Developments in petroleum Law, 1 TEX. J. oil & GAS & ENERGY LAW. 180, 180 (2006).

[28] Nigerian National Petroleum Corporation, Joint Venture Operations, available at http://www.nnpcgroup.com/NNPCBUSINESS/UPSTREAMvENTURES.ASPX accessed on 13 November 2017.

[29] Nigerian National Petroleum Corporation (n 28).

deepwaters. Nigeria's JV stipulates the level of involvement of each party in managing the affairs of the company and it determines the interest, duties and ownership of production facilities including assets.[30] The largest share older of all these joint venture is the Nigerian national oil company NNPC, which owned 60% of the company, while the remaining 40% were owned by the multinational oil companies except the venture ran by Shell, in which NNPC owned 55%. It is important to note that joint venture contract defers from other forms of contract by the way it was structured, which provides means for technology transfer and joint decision making between the host state and transnational corporations. Michael Likosky acknowledged this point and explained that "joint venture arrangement puts a premium on technology transfer and the aim is to foster eventual genuine independence by the state-owned company"[31] .

Some of the problems associated with Nigeria JV cannot be ignored because currently, PSA is the preferred choice of oil and gas contract. One of the identified challenges is poor funding due to imbalance in financial capacity which is a common problem among joint ventures partners. Transnational corporations on one hand may be financially sound while the host state on the other hand has other pressures on its resources. Transnational corporations also face challenges from host community. For example, in the Niger Delta, people always agitate and demand for development programmes in their community and it has led to several disruptions and exploration activities have been affected as a result. Consequently, as the oil and gas industry is expanding, acreages are being allocated in deep offshore areas requiring more

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[30] Nigerian National Petroleum Corporation (n 28).

[31] Micheal Likosky, *Contracting and regulatory issues in the oil and gas and metallic minerals industries, Transnational Corporations*, VOL. 18, No. 1 (April 2009) page 14.

funding and advanced technology. Therefore, exploring other options is perceived as the right solution.

3.2.3. Service Contracts

This type of oil and gas contract allows the host state to exert more control over petroleum exploration and exploitation activities. According to Likosky, under the service contract, transnational corporations are brought in to accomplish carefully delimited tasks.[32] The host state is only contracting the transnational corporation to perform a cautiously delimited service.[33] Denis also defines a service contract as “a contract by which a contractor International Oil Company (IOC) undertakes to explore for hydrocarbons at his own risk and expense on behalf of a national oil company (NOC), and by which he is reimbursed and remunerated in cash depending on the success of the exploration”.[34] Abbas and Cynthia explained further that “a service contract is a long-term contractual framework that is used by some host states to acquire the international oil companies’ expertise and capital without having to hand over the field and production ownership rights to them”.[35] Transnational corporations are strictly required under this type of contract to explore oil and gas fields on behalf of host state in return for prearranged fees without control over the final product and without profit sharing provision within the contract. It has been argued that the host states motive behind this type of contract is to benefit from transnational corporations’ skills and knowledge in

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[32] Micheal Likosky, Contracting and regulatory issues in the oil and gas and metallic minerals industries, Transnational Corporations, VOL. 18, No. 1 (April 2009) page 14.

[33] ibid.

[34] Guirauden D., Legal, Fiscal and contractual frame work, oil and gas exploration and production; reserves, costs and contracts, (3rd edition, 2004) page 170.

[35] Abbas Ghandi, C.-Y. Cynthia Lin, oil and gas service contracts around the world: A review, Energy Strategy Reviews, Volume 3, September 2014, page 63.

developing oil and gas fields.[36] The involvement of foreign oil companies enables the host state to gain from their technical know-how which is equally important. Furthermore, the host state will learn how capital is invested because transnational corporations are well equipped in terms of managing large scale investment such as petroleum projects.

Some members of OPEC and non-OPEC oil producing states have adopted service contracts for various reasons including sovereignty concerns. The service contract allows host states to maintain their sovereignty over their natural resources. Under a service contract, the host states can maintain field ownership, final product ownership rights while still benefitting from expertise of transnational corporations. Eight countries are cited here to illustrate the different models of service contract they have adopted. Venezuela first adopted Operating Service Agreements in 1991, Kuwait signed its service contract in 1992, Iran signed a Buy-back Service Contract First Generation in 1995, Mexico signed a Multiple Service Contract in 2001, Bolivia signed Operations Contract in 2006, Ecuador signed a Service Contract in 2007, Iraq signed a Producing Field Technical Service Contract in 2009 and Turkmenistan signed a Risk Service Contract in 2008.[37] It is important to note that these countries have varied the structure of their service contracts which clearly indicate that the model adopted by each country is not the same, though they are known as service contracts. There are three main types of service contracts; pure service contract, technical service contract and risk service contracts.

Pure service contracts can be explained as a type of contract where transnational corporations are invited to carry out a defined service and be paid accordingly.[38] It is important to point out

[36] Zuhairah Ariff Abd Ghadas, ‘Types and feautres of International Petroleum Contracts’ South East Asia Journal of Contemporary Business, Economics and Law, Vol. 4, issue 3 (June) ISSN 2289-1560 at page 37.

[37] Abbas Ghandi, C.-Y. Cynthia Lin (n 35).

[38] Yinka Omorogbe, the oil and gas industry: Exploration and Production Contracts (2000) at page 63.

that with pure service contract, the host state bears all the associated risk with exploration activities and Omorogbe posits that the transnational corporations also get an interest in the extracted resource.[39] The risk service contract represents a situation whereby, the host state is asking the transnational corporation to bear the associated risk with exploration activities and such request is considered out of favour for transnational corporation[40] because if the resources are not detected they will receive no remuneration. On the other hand, if the resources are found they will be paid accordingly. The last main type of service contract is known as a technical assistance contract which can be described as a type of oil contract whereby transnational corporations are invited for exploration activities and they will be paid according to the contract arrangement with no opportunity of acquiring an interest in the resource.[41] Michael further added that technical service contract is somehow close to partnership arrangement, but the host state is the stronger party.[42] Importantly, it benefits the host state to certain degree because, as posited by Smith, et al, “the technical assistance agreement is one of several types of arrangement that can be used to take advantage of the multinationals’ technological and managerial expertise and capital resources while allowing the host country to maintain at least the appearance that its State oil company has control and ownership” [43] It could then be suggested that if host states are seeking to exert greater control over their natural resources, service contract may be the solution. Though, the host state may need to be aware of the

[39] Yinka Omorogbe (n 38).

[40] ibid.

[41] ibid.

[42] Micheal Likosky, *Contracting and regulatory issues in the oil and gas and metallic minerals industries, Transnational Corporations*, VOL. 18, No. 1 (April 2009) page 15.

[43] EE Smith and others, *International Petroleum Transactions*, 2nd Edition, (2000) at page 512.

potential drawbacks of service contract because it has been labelled as economically inefficient and prone to potential losses.[44]

Furthermore, it is observed from the above that service contracts make it possible for the host state to have maximum control over petroleum development within its territory because the contract not only allows the host state to secure the service of transnational corporations, but also enables it to have easy access to their finance, technology and most highly skilled personnel. The transnational corporation simply agrees to be remunerated under service contract (pure service contract) to explore and produce the oil for the host state. While under risk service contract discussed earlier, transnational corporations bear the risk and the cost of exploration activities, if resources are detected they will recover investment costs and compensation with interest. But if no resources discovered then contract ends without compensation. Additionally, it is a form of contract that has been regarded as simpler and clearer to manage due to its structure and the fiscal system; it is not as complex as other forms of contract, particularly in its provision for tax and royalty.[45] In this regard, Gao has shed some lights where he says that supervisory process under service contract together with administrative mechanisms have been narrowed to avoid bureaucracy in the course of executing the contract.[46] Nevertheless, it cannot be disputed that service contract attracts higher income for the host state than other petroleum contracts simply because it has power over the produced resources.

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[44] Ghandi, A., & Lin, C-Y.C. (2014a), Economic Efficency and optimal Contractual Design of Iraq's Technical Service Contracts,Working paper, University of California at Davis.

[45] Zuhairah Ariff Abd Ghadas, Types and feautres of International Petroleum Contracts, South East Asial Journal of Contemporary Business, Economics and Law, Vol. 4, issue 3 (June) ISSN 2289-1560 at page 37.

[46] Gao, Zhiguo, International Petroleum Contracts: Current Trends and New Directions (1994).

3.2.4. <u>Production Sharing Agreements (PSA)</u>

Historically, the PSA was first used in Indonesia in 1966 and is now widely used in the oil and gas industry. After Indonesia became an independent nation, feelings of taking control of the country's natural resources were high and transnational corporations operating under the old concession contract were targeted and all newly awarded oil concessions were frozen by the government. A new oil contract model was introduced because the old concession was perceived as a legacy of colonial times and considered too generous to the transnational corporations at the expense of the host state. The PSAs model was preferred because it enabled the host state to uphold national ownership of mineral resources. Initially, transnational corporations opposed the newly created agreement. The major international oil companies were reluctant to invest their capital in a business which the contract debarred them from controlling or being the owners. In addition, the transnational corporations tried to avoid a situation whereby a decision to sign a PSA will set a bad precedent which might affect their business interest or oil concessions elsewhere. An independent foreign oil company, a United States of America Consortium called IIAPCO eventually signed the first PSA in 1966 and capitalised on the big oil companies' decision not to rush to the new contract. It was an opportunity to break the dominance of the big players and gain access to high quality crude oil by simply accepting the terms and conditions that had been rejected by the major players in the petroleum industry. In reality, and as discussed below, the transnational corporations control and manage the oil fields themselves. Consequently, PSAs spread across the world to other oil producing countries.

The PSA grants transnational corporations the right to explore, exploit and produce the natural resources. It is based on a sharing formula where the output of natural resources, (oil and gas) will be shared between the host state and transnational corporations according to the agreed proportion. In addition, the transnational corporations bear the entire cost and risks associated with exploration activities, and derived benefits only if resources are found. Transnational corporations are entitled under the PSA to recoup the costs of exploration and to further share in profits of oil. The first oil produced is called 'Cost Oil' and it will be sold, and the money will be used to cover the incurred production cost, service provided and risks that have been taken by the transnational corporations[47]. Peter explains further that the remaining oil and gas produced which is called 'profit oil' would be shared between the host state through its national oil company and transnational corporations in the pre-arranged percentage and according to their participation interest.[48] Similarly, Brazil's **Bill of law 5938/09** defined a Production Sharing Agreement as a:

> …regime of exploration and production of oil, natural gas and other fluid hydrocarbons" whereby oil companies will be granted rights to explore for develop and produce petroleum reserves, at their cost. In the event of a commercial discovery, costs incurred will be reimbursed to oil companies through an entitlement to production referred to as "cost oil." The remaining petroleum, after deduction of cost oil, is considered "profit oil.[49]

Moreover, the transnational corporation's profits are classed as income and they are taxable. While the resources and installations belong to the host state throughout the contract period and Michael posits that host government does take a share of the financial largess through taxation and royalty. [50] These features were incorporated into the PSC concluded between Nigeria National Petroleum Corporation (NNPC) and Ashland Oil Nigeria Co (AON), in 1973. Consequently, it is important to point out that the number of international oil companies involved in PSAs makes no difference or impact on the structure of the Production Sharing

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[47] Peter Olalere, searching for contractual equilibrium: is a production-sharing agreement in the oil and gas industry a fair balance between the interests of the host state, national oil company and foreign investor? International Energy Law Review (2015) at 34.

[48] ibid.

[49] Bill of Law (Projeto Lei) 5938-09.

[50] Micheal Likosky, *Contracting and regulatory issues in the oil and gas and metallic minerals industries, Transnational Corporations*, VOL. 18, No. 1 (April 2009) page 12.

Agreement. The contract however recognises the members of joint venture and treats them as a single partner to the underline PSCs. Thus, two parties are involved and recognised, the transnational corporations and the host state representative or a national oil company. The Nigeria National Petroleum Corporation (NNPC) is the state oil corporation which represents country interest in petroleum exploration and exploitation activities across the country.

It is observed that Production Sharing Agreements emerged from the adoption of the UN Resolutions 1803 and 3281 discussed in the preceding Chapter.[51] The resolutions provided for the sovereign rights over natural resources and for the resources to be used for the development of their country. Therefore, it can be argued that UN Resolutions have paved the way for oil producing states and their national oil companies to participate in exploration activities. In addition, it is clear from the features discussed earlier that this type of oil contract comes with risks and it can only attract transnational corporations that are willing to take risks associated with exploration activities. Transnational corporations will inject capital and bring technology with experts in the field to explore and produce oil, and if resources were discovered the transnational corporations are entitled to recoup sunk cost as stated within the underlined contract. An Azerbaijan PSA can be cited to buttress this point, Article 11. 2 of the Agreement on the exploration, Development and Production Sharing for the Shakh Deniz Prospective Area in the Azerbaijan Sector of the Caspian Sea provides that:

> “(a) Contractors shall be entitled to the recovery of petroleum cost as follow:
>
> (i) All Operating costs shall first be recovered from total Production;
>
> (ii) All Capital Costs Shall then be recovered from a maximum of fifty (50) percent of Crude Oil and fifty (50) percent of non-associated Natural Gas

[51] Micheal Likosky (n 50).

remaining out of Total production after Crude Oil and Non-Associated Natural Gas required to recover Contractor's Operating Costs".[52]

There was a provision within the same agreement that if resources were not found, the host state will be free from the associated risks. Article 2 section 2.2 takes care of that and it states that:

> …Except as expressly provided elsewhere herein, in the event production resulting from petroleum Operations, upon completion of commercial production from the Contract Area at the end of the term of this Agreement, inclusive of all extensions provided in Article 4 is insufficient for full recovery of Contractor's Capital Cost and Operating Cost as provided hereunder, the contractor shall not be entitled to any reimbursement or compensation for any of its costs not recovered. [53]

Furthermore, it is noted that the main reason for a host state adopting a PSA was premised on nationalism as well as government ownership of the host state's natural resources.[54] Al- Attar has added that a PSA is the right option for host states where reserves were large with medium exploration costs.[55] Lack of financial burden for the host states during the exploration activities and after, have been identified as one of the advantages of PSAs. The contract also allows flexibility because there is no universal model of PSA, so oil-producing states have over the years came up with various models.[56] Oil-producing states in this category are Nigeria, Oman, Indonesia, Malaysia, Brazil, Angola, Kazakhstan, Azerbaijan and Equatorial Guinea just to mention a few.

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[52] Article 11 section 2 of the Azerbaijan's Production Sharing Agreement 1996. The agreement was signed between Azerbaijan state oil company and the following oil companies; Socar Commercial Affliate Azerbaijan, BP Exploration Azerbaijan Limited (United Kingdom), Elf Petroleum Azerbaijan B.V.

[53] Azerbaijan's Production Sharing Agreement (n 52) Article 2 section 2.2.

[54] Bindemann, Production Sharing Agreements: An Economic Analysis.

[55] A Al-Attar and O Alomir, "Evaluation of Upstream Petroleum Agreements and Exploration.

[56] B Taverne, Petroleum Industry and Governments: An Introduction to Petroleum Regulation, Economic and Government policies (The Hague: Kluwer Law International, 1999) at page 155.

Brazil has recently adopted PSA and the only justification for the switch was to ensure a maximisation of financial output for the country. PSAs have proven to be a good formula for developing countries. Brazil adopted the model owing to the discovery of the sub-salt reservoirs off the coast of Brazil. The public oil company in Brazil is known as Brazilian Petroleum Corporation — Petrobras. It is observed that the primary aims of the government were to increase the revenues as well as controlling and participating in the country's exploration and exploitation activities. The Brazilian government also acknowledged that the concession contracts, which are very common until discovery of sub-salt reservoirs, were not appropriate and the model may not allow the country to take full advantage of the newly discovered reservoirs. Under the Brazilian constitution transnational corporations are the owner of the produced oil because Article 176 provides that:

> Mineral deposits, whether being worked or not, and other mineral resources and hydraulic energy sites constitute property distinct from the soil for the effects of exploitation or use, and belong to the Union, guaranteeing to the concessionaire ownership of the output of deposit.[57]

According to the above provision, the concessionaire has the sole right to the produced oil, the transnational corporation becomes the owner of all the hydrocarbons produced subject to taxes and royalties. While under PSAs and as explained by Binder Mann, the host state is the owner of the produced oil and part of the produced oil will be shared with transnational corporation for the risks involved in exploration and exploitation activities.[58] Therefore, with the new discovery, the Brazilian government believe that a change was necessary to take full control of

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[57] Art 176 of the Brazilian Federal Constitution CF/88C/C available at <https:www.constituteproject.org/constitution/Brazil_2014.pdf> accessed 18 January 2018.

[58] Bindermann K, Production Sharing Agreement: an economic analysis. Oxford institute for Energy Studies, 1999.

country's natural resources and PSA is the right solution. Petrobras is the national oil company and serves as sole operator and held minimum 30 percent equity in all offshore pre-salt oil and associated gas fields.[59]

Equatorial Guinea relies on oil revenues because petroleum production dominates its economy, accounting for over 70 per cent of the national income.[60] In addition, the oil and gas industries are the force behind the current growth in Equatorial Guinea's GDP and the country's quick development. It is compulsory to use the production sharing contract model in Equatorial Guinea as the contract model allows the host state greater control compared to other types of contracts discussed earlier. Meanwhile, the Equatorial government was involved in exploration activities directly through her national oil company known as GEPetrol. GEPetrol was endorsed as the national Oil Company by Presidential Decree NO.9/2001 to manage the state's participation as a shareholder, acts as agents for the sales of the state's share of hydrocarbons and be responsible for the promotion of open acreage within Equatorial Guinea.[61]

In addition, transnational corporations are required by Equatorial Guinea's law to involve the national workforce and local companies in their exploration and exploitation activities. It is mandatory under domestic law that companies formed within Equatorial Guinea must give 35 per cent of its share to local companies and most importantly, the national oil company works alongside transnational corporation as a partner to ensure local contents requirements are met. This measure was put in place to benefit the country's economy. It is reported that the country gains economic benefits from petroleum exploration in two ways; directly by a way of taxation

[59] Aavailable at <https:www.export.gov/article?id=Brazil-Oil-and-Gas> accessed on 18 January 2018.

[60] Available at <http://www.equatorialoil.com/Introduction.html accessed on 16/01/2018> accessed 18 January 2018.

[61] Available at <http://www.equatorialoil.com/GEPetrol.html> accessed on 16 January 2018.

and licensing and indirectly by enacting law which provides that all foreign companies should invest in social projects and allow indigenous companies to take part in petroleum exploration and exploitation activities.[62] These provisions are fully examined in this chapter under PSA's local content, and the next paragraph explains PSAs in the Nigerian context.

Joint Ventures are the most common types of petroleum contract in Nigeria, a fiscal regime which requires the government to contribute funds towards the exploration activities annually. This payment is known as cash calls payment with the International oil companies. However, Nigeria is currently using PSA and it covers acreages in the shallow, inland basin and deep offshore areas. It is observed that Nigeria adopted PSAs due to its inability to partner alongside the transnational corporations because deep offshore exploration involves huge capital and prospect risks were significantly high. Therefore, PSA was adopted as a means for achieving deep offshore production[63]. In addition, it is further reported that the Nigerian Federal Government, because of other pressing needs, struggled to fund the cash calls for the development of joint venture projects with transnational corporations and as a result adopted PSC to rescue the country from funding challenges.[64] It was also noted that there was a significant drop in crude oil production in Nigeria joint venture between NNPC with Chevron, Shell and Exxon Mobil. The production dropped by over 50 percent in the previous 10 years because of inadequate resources to fund JV by the NNPC. The report also revealed further that Nigeria should have been producing 500,000 to 1 million barrels per day more than its current production if the government was able to provide the required cash calls for the joint ventures. The cash calls have therefore been reported as the major reason for the NNPC's inability to

[62] Ariticle 88, 92 and 93 of Hydrocarbons Law No. 8/2006.

[63] Idornigie Oboarenegbe, *What is the justification for the proposed renegotiations of deep offshore production-sharing contracts in Nigeria?* International Energy Law Review, 2008 at page 199.

[64] Idornigie Oboarenegbe (n 63).

meet the reserve target of 4 million barrels per day production by the previous government. The report later concluded that lack of funding for JV has led to a slash in the Nigeria joint venture's assets while output from exploration activities has risen under PSA by about 700 percent. The justification for the rise in production is due to the features of PSA explained earlier that the host state will not be required under PSA model to contribute any fund as the transnational corporations provide all of the risk capital, technical and manpower necessary for exploration and exploitation activities. Therefore, Nigeria has benefited from this model and the country has so far developed five offshore fields[65] without contributing funds towards the projects and this has enabled the country to focus on other needs.

Furthermore, Nigerian PSAs are regulated by an Act of Parliament, the Deep Offshore and Inland Basin Production Sharing Contracts Act No.9, Law of the Federation of Nigeria, 1999.Nevertheless, the initial PSA signed by the parties will still be honoured because the rights and duties of the parties to PSA are clearly stated in the underline contract, with the relationship governed by the terms and conditions of the contract. Another good aspect of PSC is the opportunity afforded to the host state to maintain its local law and at the same time fulfils its duties towards the transnational corporations under the contract. Nigerian Law however does provide for the tax regimes and applicable royalties. It further stipulates how costs and profits are allocated between the transnational corporations and the host state. It is noteworthy that the law indicates a payment of 50% flat rate tax on oil profits by PSA operators[66] and

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[65] The five oil fields are Shell' Bonga which is the first deep-water project for the Shell Nigeria Exploration and Production Company (SNEPCO). This field is operated under PSC on behalf of NNPC and crude oil production from the field started in 20015. The remaining four oil fields are Exxon Mobil's Erha, Total's Akpo, Total' Usan and Chevron Agbami.

[66] Deep Offshore and Inland Basin Production Sharing Contracts Act No.9, Section 3 (1). The complete text of the Act is available at <http://www.nigeria-law.org/DeeOffshoreAndInlandBasinProductionSharingContractsDecree1999.htm> accessed 22 November 2017.

further laydown various royalty regimes which will be determined by the water depth in which exploration activities are taking place. For example, 12 % for water depths in area from 201-500 metres, 8% for water depths in area from 501 to 800 metres, 4% for water depths in area from 801 to 1000 metres and 0% in areas in excess of 1,000m,[67] while, the inland basin's royalty is just 10%. [68] Section 4 (2) of the Act also make provision for Investment Tax Credits and allowances to the investors, but the rate is 50% of the value of investment.[69] Consequently, it is argued that transnational corporations prefer PSA than other types of petroleum contracts and one of the reasons given is the fact that they have open access to part of the production.[70] Not only that, PSA provides for legal protection and above all, the oil block field can be used by the transnational corporations as collateral security for bank loan according to OKoli.[71] The Production Sharing contract is compared below with the rest of petroleum contracts.

3.2.5 <u>A comparison between a Production Sharing Agreements and other types of petroleum agreements.</u>

3.2.5.1 <u>Concessions and PSA</u>

Compared to the old concession agreement, there is a similarity and there are differences between the two types. Transnational corporations oversee exploration activities in both, but the PSA acreage area is limited and defined in nature. The duration of exploration under PSA is also limited because if the allocated area is not explored within the required period and around the given phase, then it must be given back to the host state. It is noted from the

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[67] Deep Offshore and Inland Basin Production Sharing Contracts Act No.9 (n 66) Section 5 (1) (a) (b) (c) and (d).

[68] ibid Section 5 (2).

[69] S.3-10 of Deep Offshore and Inland Basin Production Sharing Contracts Act No.9, Law of the Federation of Nigeria, 1999.

[70] Miguel Soares Branco, product sharing agreement- legal blessing or course for developing countries? I.E.L.R. at 147.

[71] Okoli, Production sharing agreement and licences: a distinction without a difference? 8, International Energy Law Review, 2012 at 282.

Kuwait's old concession that 75 years is granted for exploration while under PSA 20 years may be granted for exploration and production and 8 out of the 20 years may be for explorations and the remaining years is expected for production. This feature makes PSA attractive to the host state according to Peter[72]. Transnational corporations are the owner of produced resources under old concessions but under PSAs, transnational corporation cover the cost of exploration and when resources are found, the host states get involved as the owner of produced resources. In addition, the PSA has been described as the best type of oil contract that defines better income tax regime for the host state than concession and stipulates how the profit of produced resources will be shared between the host state and the transnational corporations.[73]

Furthermore, it is also possible under PSA for the host state to demand for the deployment of local competent, material and human resources as indicated in Nigeria's Petroleum Act.[74] This requirement is known as local content (LC) and the reason attributed to this special request is that transnational corporations tend to acquire market dominance which favour complex system akin to large foreign companies but in turn exclude locals from participation and control of operations.[75]The LC was defined by Berryl as "a legal obligation that comprises requirements imposed by host state on an investor to source locally a percentage of the necessary labour, good and services as a condition of being permitted to operate in the host country".[76] The majority of resources rich states have therefore, taken advantage of this and introduced local

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[72] Peter Olalere, searching for contractual equilibrium: is a production-sharing agreement in the oil and gas industry a fair balance between the interests of the host state, national oil company and foreign investor? International Energy Law Review (2015) at 35.

[73] ibid.

[74] S. 38 of the Petroleum Act 1969 contains local content requirement.

[75]Berry Claire Asiago, *The regulatory rationale for local content requirements in the petroleum industry,* international Energy Law Review.

[76] Berryl Claire Asiago, Fact or fiction*:* harmonising and unifying legal principles of local content requirements, Journal of Energy & Natural Resources Law, volume 34, issue 3, 2016.

content requirements in various petroleum contracts. For example, Nigeria has a provision within the legislation which addresses the issue of local content as well as contractual provision in the 1993 PSA model. It is therefore important to look at the provision under Nigeria Law before looking at various clauses across the world where local content was included in their PSA Models. Section 38 of the First Schedule to Nigeria Petroleum Act 1969 provides that:

> *"the holder of an oil mining lease shall ensure that-*
>
> *(a) Within ten years from the grant of his lease*
>
> *(i) The number of citizens of Nigeria employed by him in connection with the lease in Managerial, professional and supervisory grades (or any corresponding grades designated by him in a manner approved by the Minister) shall reach at least 75% of the total number of persons employed by him in those grades; and*
>
> *(ii) The number of citizens of Nigeria in any one such grade shall be not less than 60% of the total; and*
>
> *(b) all skilled, semi-skilled and unskilled workers are citizen of Nigeria*[77]
>
> *(iii) behind it is for the host which under the United Kingdom Petroleum modern licensing, the Petroleum Act 1998.*

Additionally, Nigeria has enacted a new law, the Nigeria Oil and Gas Industry Content Development Act 2010. This Act of Parliament was made to ensure measurable growth of Nigerian Content in the oil and gas exploitation activities. For example, S.7 of the Act required that transnational corporations should all submit Nigeria Content plan for oil and gas projects. The Section provides that:

> In the bidding for any licence, permit or interest and before carrying out any project in the Nigerian oil and gas industry, an operator shall submit a Nigerian content plan ("the Plan") to the Board demonstrating compliance with the Nigerian content requirements of this Act.[78]

Section 12 of the Act also states that:

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[77] Petroleum Act 1990 Cap. 10 Nigeria available at <http:www.nigeria-law.org/Petroleum%20Act.htm> access ed 03 December 2017.

[78] S.7 of the Nigeria Oil and Gas Industry Content Development Act 2010. Available at www.nass.gov/document/download/5894 accessed 13/01/2018.

> Subject to section 7 of this Act, the Nigerian Content Plan submitted to the Board by an operator shall contain a detailed plan, satisfactory to the board, setting out how the operator and their contractors will give first consideration to Nigerian goods and services, including specific examples showing how first consideration is considered and assessed by the operator in its evaluation of bids for goods and services required by the project.[79]

Furthermore, Section 15 of the Act provides that:

> All operators and alliance partners shall maintain a bidding process for acquiring goods and services which shall give full and fair opportunity to Nigerian indigenous contractors and companies.[80]

Similarly, there was a clause in the Nigeria PSA model on the issue relating to rights and obligations of the parties. The clause requests transnational corporation to:

(i) *prepare and carry out plans and programmes for industrial training and education of Nigerians for all job classifications with respect to petroleum Operations in accordance with Petroleum Act 1969;….*

(k) *Employ only such personnel as are reasonably necessary to conduct the petroleum Operations and employ qualified Nigerian Nationals to the maximum extent possible and in this respect:*

(i) *CONTRACTOR shall determine the qualifications and number of positions required to conduct petroleum Operations in a prudent and cost-effective manner*

(ii) *Qualified Nigerians shall be employed in all non-specialized positions.*

(iii) *Qualified Nigerians shall also be employed in specialized positions such as those in exploration, drilling, engineering, production, and finance. CONTRACTOR shall have the right, subject to applicable laws; rules and regulations, to employ non-Nigerians in such specialized positions where qualified Nigerian are not available provided that CONTRACTOR shall recruit and train Nigerians for such specialized positions such that the number of non-Nigerian staff shall be kept to a minimum.*

…

(I) Give preference to such goods which are available in Nigeria or services rendered by Nigerian nationals, provided such goods meet the industry standards and such services are of good quality and are offered at competitive prices and are timely available.[81]

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[79] S.12 of the Nigeria Oil and Gas Industry Content Development Act 2010. Available at <www.nass.gov/document/download/5894> accessed 13 January 2018.

[80] ibid.

[81] Nigeria's PSC Model of 1993 clause 8.1.

Equatorial Guinea is also one of the developing states that have adopted PSC and it reserved preferences for its citizen in terms of services, employment and training in its domestic legislation and PSC model. Article 88 of Equatorial Hydrocarbon Law provides that;

> "The state, and the Contractors shall contribute to the study, design, construction, equipment, operation and maintenance of the Hydrocarbon Technological Institute of Equatorial Guinea and creation of training centres for persons from Equatorial Guinea working in Petroleum Operations or operations related thereto, regardless of their promotion, support and development of other training centres with similar purposes in existence in Equatorial Guinea"[82]

Article 92 also states that;

> Contractors shall train and integrate national personnel into all levels of their organisation in accordance with this Law and the terms of their Contracts. In addition, to the above, each Contractor will likewise contribute to the training of Ministry personnel. To that end, the Contractor shall annually provide the Ministry with a sum in United Sates Dollars during the Exploration and Production periods. This amount shall be determined by the Ministry in accordance with its prudent judgement by means of a resolution stating the grounds for such decision, and taking into account factors such as the phase, whether Exploration or Production, in which the Contractor is involved, as well as the level of activity being developed by the Contractor within the country. These amounts shall be considered Petroleum Operations costs.[83]

Article 93 also provides that:

> "Contractors shall cooperate with the Government to identify projects which promote the realization of public benefit activities of the broadest possible impact on the public welfare. Contractors shall carry out all projects designated by the Government and shall submit a proposal for approval by the Ministry prior to undertaking any project not designated by the Government. To that end, during both the Exploration and Production periods, the Contractor shall annually provide the Ministry with an amount in United States Dollars. This amount shall be determined by the Ministry in accordance with its prudent judgement, by means of a resolution stating the grounds for such decision, and taking into account factors such as the phase, whether Exploration or Production, in which the Contractor is

[82] Article 88 of Equatorial Hydrocarbon Law of the Republic of Equatorial Guinea No. 8/2006 available at <http://www.equatorialoil.com/PDFs%20for%20download/EG%20Hydrocarbons%20Law%20(English%20Translation)_v7.1.pdf> accessed on 16 January 2018.

[83] ibid at Art 92.

involved, as well as the level of activity being developed by the Contractor within the country. These amounts shall not be considered Petroleum Operations costs".[84]

The PSA's contract provides that:

From the Effective Date, the Contractor shall ensure priority employment for adequately qualified Equatoguinean personnel in all levels of their organisation, as the employee's skill allows, and as provided for in Article 23.2.2, shall train or contribute in the training of such personnel to enable them to qualify for any position relating to Petroleum Operations. Expatriate personnel may only be employed if the Contractor and its subcontractors have exhausted all possibilities of recruiting adequately qualified Equatoguinean personnel in the required area of specialization.[85]

In addition, there was a preference provision in its PSA Model and it requires that:

The Contractor and its subcontractors undertake to give preference to Equatoguinean services, materials, equipment, consumables and other goods whose quality and time of delivery are comparable to those available internationally, provided that the cost in Equatorial Guinea is no more than ten percent (10%) above the cost of similar services, material, equipment, consumables and other goods available internationally.[86]

Mexico also acknowledged the importance of LC and this is reflected in its PSA model where it was clearly stated that:

"Subject to the applicable Provisions, including the international treaties ratified by Mexico, in case of subcontracting of the Works in accordance with Clause 16, the Contractor shall give preference to (i) acquiring goods of Mexican origin and (ii) hiring services provided by Mexican companies, whether private or state-owned, provided such goods and services are competitive with regard to price, quality, delivery time and any other condition relevant for subcontracting.

… Without prejudice to that provided in the Applicable Provisions, including articles 7 and 154 of the Federal Labor Law, in the hiring of the Contractor's Personnel engaged in the execution of the Works, the Contractors shall give preference to professional's workers, and other

[84] ibid Art 93
[85] Model Petroleum PSC, The Hydrocarbons Law Article 23.2.2 (Decree Law No. 8/2006, 2006 (Equatorial Guinea).
[86] ibid

> employees of Mexican nationality when they have the qualifications and experienced required for the Works provided in the Contract.

It is noted from the above that developing states are using PSA as a vehicle to enhance local content and to create jobs for their citizens. It is clearly shown that transnational corporations are required to employ at least 60% of Nigerians either skilled or unskilled and it can be argued that PSA offered host states something unique that may not be achieved in other types of petroleum contracts.

However, Local Content provisions have been heavily criticised by Claire who maintains that LC can only be successful if the rights balance is struck between local and foreign participation. [87] The motive for local content should never be inspired by nationalist movement or policy choice on political motivations and host state must ensure it is based on economic and development reasons. She argues further that transnational corporations in the oil industry have competent professional and technical workers in their work force as well as products that are new or complex in nature, therefore, allowing foreign participation may be a good opportunity for the citizens of host state and local companies to share capital and technology which would eventually help to promote capacity-building and develop competence and know-how. Nevertheless, foreign participation is often resorted to, at least initially, to train locals to eventually take over, at least in part, operations in the industry.[88] Clement added that there are many reasons to justify the local content policies which include fostering indigenous businesses, job creation, capacity building and training, environmental and social protection

[87] Berry Claire Asiago, The regulatory rationale for local content requirements in the petroleum industry, international Energy Law Review, at 234.

[88] ibid.

and to promote industrial strategies.[89] Other commentators have viewed foreign participation critically and posit that it kills local firms due to the unhealthy competition from foreign investors.[90] Some argued that it has led to loss of jobs in the privatised parastatals[91] and endangerment of host community's fundamental human and worker's rights[92] and the degradation of environment.[93]

Thus, local content aspiration needs to be backed by law because with no legislative support for implementation of local content policy, the transnational corporations may ignore and see it as mere policy. Evidence from Nigeria has shown that in the past, most of the works in the oil and gas industry were carried out outside Nigeria despite the local content policy and it has had a negative impact on job creation, development of local skills and the economy. However, the newly created law has seen dramatic changes because the law stated clearly that oil and gas industry jobs should be carried out locally to build local capacity and violation of the provision will not be tolerated. A recent investigation by the Nigerian House of Representatives to the conduct of transnational corporations can be cited as a good example. It was brought to the attention of Nigerian lawmakers that transnational corporations refused to engage the services of indigenous vessels but prefer to engage foreign vessels that were not flying the Nigerian flag and this attitude is considered a violation of the Nigeria law by international oil and gas

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[89] Christopher Clement-Davies, Energy policy and politics, an often-tense balance, International Energy Law Review 2017. Editorial at page 202.

[90] S S Njamasi, *The role of the law in the conduct of Foreign Direct Investment in a Developing Country: A critical Study of the Role of the law in the conduct of Foreign Direct Investment in Tanzania* (University of Dar es Salaam, 2011) page 100.

[91] K Baregu , *Foreign Direct Investment in Tanzania: The Role Played by Foreign Investors in the Protection of Human Rights* (University of Dar es Salaam, 20014) page 172

[92] ibid at page 52.

[93] K Baregu (n 91) page 79.

companies.[94] Nevertheless, Nigeria has benefited from LC, particularly, the provisions within the national policy which provides that transnational corporations must give a detailed work programme for training Nigerians and that money spent towards training and education should be catered for by development and production. Numerous positive impacts of the inflow of investments on the economy and benefits for the host state have been pointed out in academic writeups. It has been argued that foreign investments have produced positive externalities or spill-over benefits such as higher wages, transfer of skills, knowledge and technology and quicker productivity growth.[95]

3.2.5.2 <u>Joint Ventures and PSA</u>

Joint-Venture models enable a host state to exercise more control over exploration activities because of its direct involvement as a partner through its national oil company. This model was preferred by the NNPC until recent times when government struggled to contribute its share of the joint venture, the annual cash calls financial commitments. As explained earlier on, JV requires that all parties involved in the project do things jointly. JV partners operate through joint operation agreement which stipulates how the parties will work with each other. Above all, it has certain advantages which include opportunity to work with major oil companies and their skilled staff, joint decision on exploration and production activities and shared responsibilities in terms of costs and associated risks. It has however been argued that there is a downside of sharing risks and costs with transnational corporations under JV because it will put the host state in difficult position, it makes the host state a responsible and direct participant in the extraction of natural resources. It comes with a huge responsibility such as liability for environmental damage and the principles of international environmental law have established

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[94] Available at <https://www.today.ng/business/energy/32866/house-reps-probe-oil-coys-level-compliance-local-content> Access 13 January 2018.

[95] J Bonnitcha, *substantive production under investment Treaties. A legal and EconomicAnalysis* (Cambridge University press 2014) page 103.

that those who cause harm to environment should pay for the damage resulting from their activities. A case in point is the affirmation that the oil industry in Nigeria is contributing to environmental pollution in the Niger Delta area.[96] In addition, host state participation in joint venture projects may have huge impact on the application of necessary laws to address the pollution crises and evidence has established that the Nigerian government has about 50 per cent stake in joint venture petroleum projects.[97]

3.2.5.3 Service Contracts and PSA

Service Contracts are extensively evaluated in this chapter. it is observed that this type of oil and gas contract confer greater control on the host state and its representative National Oil Company. On one hand, service contract allows the host state to retain the full control of exploration and exploitation activities being produced on its territory, while the transnational corporation on the other hand carried out the exploration activities with the anticipation of getting paid for the services rendered to the host state. The similarities between this model and PSA cannot be overemphasised. In these two contract types, the transnational corporation can recover the production cost through the sale of produced natural resources; it is called cost oil under PSA. In addition, a service contract is like a PSA in terms of wording, relevant clauses, the duration of contract and basic economic structure. For example, both contract types allow easy access to transnational corporations' finances, technology and highly skilled personnel. Particularly under the risk service contract, the transnational corporations bear the risk and cost of exploration activities, if resources are discovered, they will recover investment costs and compensation and if no resources are found, then contract ends, and they walk away without compensation. While under PSA, the transnational corporation will invest capital and bring

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[96] As established in Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication NO 155/96, examined in Chapter 2 at page 117.

[97] Available at< http://nnpcgroup.com/NNPCBusiness/UpstreamVentures.aspx> accessed 22 January 2018.

technology with experts in the field to explore and produce oil, and if resources were discovered the transnational corporations are entitled to recoup sunk cost as stated within the underlined contract. The host state however, under a PSA becomes the property owner of all equipment and installation used in exploration and exploitation activities. This factor is significant for developing countries which are struggling to fund or invest in petroleum exploration activities themselves, so that they may use the retained installations to build an independent oil and gas industry. Consequently, the most notable difference with the production sharing contract is that the so-called profit oil is kept by the host state under service contract and it cannot be shared with transnational corporations as described in production sharing agreement. This often happen under pure service agreement in a situation where the cost of exploration activities is covered by the host state and the transnational corporations are only paid for their services with no claim to the produced oil.

3.3 Conclusions

It is observed from this chapter that the use of petroleum contracts for exploration and exploitation activities has developed over the years to meet the needs in the oil and gas industry. Particularly, the host states in developing countries are now certain that oil will be found and have moved on from the era of classic concession whereby a small amount of money will be offered to them for exploration across the country. The contract types have helped the host state to uphold and benefit from the United Nations General Assembly resolution 1803 (XVII) of 14 December 1962, which established that all states are free to dispose of their natural wealth and resources in accordance with their national interests.[98] The host states, through oil and gas contracts, have taken control over their natural resources. This was a departure from the era when exclusive rights were granted to international oil companies to explore and produce oil for 75 years with freedom to control exploration activities because there was no certainty that

[98] Available at< http://www.ohchr.org/EN/ProfessionalInterest/Pages/Natural/ Resources.aspx> accessed 23 January 2018.

the oil will be discovered. However, the new concession has curtailed IOC's power to explore for indefinite period and removed unfavourable features of the old concession. The host state now formed part of the decision-making process with its citizens being allowed to work in the oil industry as a result of contract development. Concerns about the lengthy period and geographical location were minimised, and territories are now being allocated as blocks. Above all, modern concession required the IOC to apply for an extension if deemed necessary.

Furthermore, it is observed that JV was introduced and considered to be a better option for the host state due to the fact that JV model enables the host state to be directly involved in the exploration activities through its national oil company (NOC). It is noted that Nigeria adopted this type of petroleum contract due to its technical aspects and joint funding for the exploration project including shared responsibility for the associated risks. Under JV, the national oil company is the owner of the produced oil and is responsible for the preparation of the proposals for programme of works. It is further observed that JV arrangements have a unique advantage of technology transfer which will ultimately enable the host state to operate independently. However, evidence has shown that JV was ineffective and became problematic due to imbalance in financial capacity and host state's inability to live up to expectation when the annual cash calls financial requirements were demanded. This factor amongst other things led to the adoption of production sharing agreement in Nigeria.

Several oil producing countries are also using PSAs. For example, the Brazilian Government believes that it is the best option for the newly discovered sub-salt reservoir and preferred it over the modern concession. The Brazilian government quickly switched to PSAs and argued that the change was necessary to take control of the country's natural resources. It should be noted that PSA's features revealed that the host state is the owner of the produced oil. It was also recognised that PSA is a good choice for the host state where reserves were large like Brazil and other developing countries that are willing to enhance their productivity.

Additionally, a PSA offers developing countries a great opportunity to create jobs for indigenes of host states as seen in different legislation examined in this chapter where the host states require international oil companies to source locally a percentage of labour, goods and services as part of the conditions of being allowed to explore and produce oil in their territories. Amongst others, Equatorial Guinea even made it an obligation for the transnational corporations under its PSA to recruit suitable Equatorial Guinean personnel at all levels of their organisation and asked that preference should be given to the country's goods and services. Similarly, service contract have over the years made it possible for the host state to acquire the transnational corporations' capital and expertise without transferring production ownership and oil field to the IOC. It is further noted that service contract addressed the sovereign concerns because the model allowed the host state to take over control of their natural resources and it is regarded as simpler and clearer to manage due to its tax and royalty provision. Nevertheless, it can be argued that, while the choice of petroleum contract type is a major consideration for the continuous development, protection and promotion of host state and transnational corporations' interests, the name of contract or contract types is less important according to Solimene.[99]He posits further that the most important thing is the content of the clauses of the contract. In addition, what matter most is host state's ability to mix and match clauses from all types of petroleum contract to come up with a tailor-made contract which can reflect the host state and transnational corporations' needs and balance their rights. However, by evaluating the evidence and features of all the contract types presented in this chapter, it appears that PSA has many features which make it standout and preferable among stakeholders than other types of oil and gas contracts in the industry. PSA features appear to be extremely beneficial and advantageous to those host states with very limited resources to invest.

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[99] Fabio Solimene, 'Production-sharing Contracts, Joint Ventures and Service Contracts: Analysis and drafting considerations' (2014) International Energy Law Review 179.

CHAPTER 4

THE CAUSES OF IMBALANCE IN INTERNATIONAL OIL CONTRACTS

4.1 Introduction

It is submitted that one of the causes of imbalance in oil and gas contracts are investment treaties and this is because treaties focus on states' obligations towards the transnational corporations but none or very little obligations deals with transnational corporations obligations towards the states. Problems associated with investment treaties have been fully examined in preceding chapters therefore; this chapter addresses the causes of imbalance by looking at the long-term contractual relationship particularly the associated risks with oil and gas contracts such as political, economic, natural and technical risks.

The imbalance in oil and gas contracts has been regarded as a deficiency of the investment regime.[1]Sornarajah described it as a "power-base which seeks to secure the rights of business over the rights of people" and this underlined the need for an evolution from a host state with duties towards the transnational corporations to a host state with rights in relation to the investor.[2] According to Mato, the host state and the transnational corporations have different objectives, host states in one hand aspire to promote their economic growth while the transnational corporations on the other hand want to maximise their profits.[3] In order to evaluate these postulations, the following paragraphs will analyse some of the important clauses in oil and gas contracts and critically discuss the risks inherent in exploration projects.

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[1] Ximena Herrera-Bernal, Arbitral jurisprudence: the arbitrator's concerns about treating the parties equally and taking into account the needs of the state/0r concession authority, International Business Law Journal, (2013) at 308.

[2] Muthucumaraswamy Sornarajah, The international law on Foreign investment 3rd ed, (Cambridge University Press, 2010) pp 169-203.

[3] H.T. Mato, the Role of Stability and Renegotiation in Transnational Petroleum Agreements, (2012) 5 Journal of Politics and Law At page 33.

The aim of this chapter is therefore, to critically examine the causes of imbalance in oil and gas contracts from the perspectives of both the host state and the transnational corporation. It is noted that the host states view oil and gas as a patrimonial inheritance[4] belonging to the country and incoming generations which must be preserved. In this regard, the host state found itself in a very difficult position to watch over the natural resources and ensure the transnational corporations are not keeping to themselves the "windfall profits" acquired as a result of petroleum exploration activities. In achieving this, the host state deemed it necessary to have a petroleum contract that can meet its needs and those of its citizens.[5] However, clauses in oil and gas contracts can put the host state in an unimaginable situation whereby it could be deprived of exercising its fundamental rights as a sovereign power. For example, stabilisation clauses in oil and gas contract can override domestic legislation or stop the state from enacting new law targeted at bringing the petroleum contract in line with the socio-economic realities in the country. In the same vein, an attempt to unilaterally alter the terms of contracts or introduce new fiscal regime may erode the transnational corporations' profits and thereby affect exploration projects. The important question then is; what can the transnational corporations do to ensure economies of the exploration project are protected?

It is observed from the preceding chapter that oil and gas exploration projects are associated with risks from exploration to production. In addition to these risks and the sunk cost, this sort of investment requires a lengthy period to start yielding benefits for the transnational corporations. Above all, some oil and gas contracts required that the risks of exploration and exploitation should be taken all alone by the transnational corporations and if the resources were not found, they walk away with no gains. To reduce some of the associated risks, the

[4] Bede Nwete, 'To what extent can renegotiation clauses archive stability and flexibility in Petroleum development contracts?' (2006) International Energy Law & Taxation Review 58.

[5] The four types of oil and gas contracts have been carefully considered in chapter 3 of this thesis.

transnational corporation may enter into a loan agreement with a project lender who will be assured that repayment will be made from the profits generated through the exploration project. They may also enter into contract with joint ventures and off-takers during exploration project with the anticipation of making profits, which makes it important that oil and gas contracts are stable, predictable and profitable. This is achievable if the oil and gas contract terms can be protected by inserting clauses such as stabilisation and other relevant clauses that will ensure the rights and obligations of the parties in the contracts are fulfilled. This chapter therefore focuses on some special clauses in oil and gas contracts that transnational corporations may consider before entering into agreement with the host state to minimise risks emanating from measures which are likely to affect their investment.

This chapter examines the following clauses namely and in summary, stabilisation, renegotiation, force majeure, arbitration and choice of law. In respect of stabilisation clauses, the chapter investigates various types of stabilisation clauses and shed some lights on their effects and benefit for the host state and the transnational corporations. It is argued that the freezing clauses are not suitable, and the transnational corporations may not rely on them simply because they cannot prevent the host state from exercising its sovereign power in the public interest.[6] The chapter concludes that the economic stabilisation tend to strike the right balance because under this category the transnational corporations already aware that a new law could be enacted but with a promise of compensation to make up for their loss and negative effects of the new law on their business. In addition, the hybrid clauses reflect certain aspects of freezing and economic clauses. It does not prevent new law but requires that the transnational corporations are excluded from the new law and further provides for compensation scheme to put them back to economic condition as it would have been had new

[6]AFM Maniruzzaman, 'The pursuit of stability in International Energy Investment Contracts: Acritical Appraisal of the Emerging Trends' (2008) J. OF World Energy L. & Bus 124.

legislation not been made. The case of ***Texaco Oversea Petroleum Company v. The Government of the Libyan Arab Republic***[7] is carefully considered in the chapter to establish the effects of the stabilisation in oil exploration agreement.

Furthermore, the chapter looks at academics' views on renegotiation clauses because it is believed that the aim of renegotiation clause is to maintain the relationship between the host state and the transnational corporations. It keeps business relationship alive by enabling the parties to strike the right balance when it is obvious that circumstances have changed and the changes to the underline agreement can be justified. According to Berger using a renegotiation as a mechanism to strike the balance will benefit the host state and protect the transnational corporation against unexpected changes in the law governing the exploration agreement.[8] The disadvantages of this clause are highlighted in the chapter because the host state can capitalise on the provision and use it unfairly against the transnational corporations. For example, they can unilaterally change the law for an event within the control of the host state. Nevertheless, the renegotiation clause can be a useful tool if there is a genuine change in circumstances which affects the economic viability of the contract as established in this chapter. In addition, the chapter reflects the arguments in favour and against the force majeure clauses. The court of Appeal ruling on what counts as force majeure clause is also considered in ***Great Elephant Corp v TrafguraBeheerr BV Crudeesky***[9] where the court is required to ascertain whether the clause can exclude a party for unnecessary delay in the performance of its obligation within the agreement and if the performance was delayed because of unforeseeable circumstances. The chapter further reveals in oil and gas related cases, ***(JSA) Phillips Petroleum Co. Iran V***

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[7] (YB Com Arb 1979, 1777).

[8] Klaus Peter Berger, Renegotiation and adaptation of International Investment contract: The Role of Contract Drafters and Arbitrators, 36 Vanderbit, J Tran' I L 1364 (2003).

[9] [2013] EWCA Civ 905; [2013] 2 All e.r (Comm) 992.

the Islamic Republic of Iran,[10]***Mobil Oil Iran, Inc, et al v Iran***[11] and ***Sylvania Technical Sytems, Inc., v the government of the Islamic Republic of Iran***[12] where the Tribunal gives example of events that can justify nonfulfillment of contract's obligations under the oil and gas contract and what may not constitute a condition of force majeure.

The binding effects of arbitration clauses are carefully considered in this chapter. Apart from provision under s.54 of ICSID that makes it a compulsory for contracting member to recognise its award as final and biding. It further provides that any obligations imposed by the award must be enforced as the final judgement in member state's court. Nigeria is among the contracting members around the world that have favoured arbitration to settle investment's disputes and created many laws to promote arbitration, particularly, for the settlement of dispute in oil and gas industry. However, the chapter contained information which highlight that certain disputes are excluded from arbitration in Nigeria. Some of the decisions which emanated from tax related cases in Nigeria establish that tax related matters are not arbitrable despite the provision under the Nigeria Oil Pipeline Act, 1990 which provides that dispute arising out of oil and gas agreement should be referred to arbitration.[13] The chapter examines a number of principles applied by the judges in Nigeria which show that tax related arbitration in the country cannot be predicted.

The governing law of the agreement plays an important role in arbitration and its proceedings therefore, the chapter focuses on the factors to be considered by the parties in establishing the applicable law in the agreement. The choice of law determines what law applies to oil and gas

[10] ITL 11-39-2 (Dec. 30, 1982).

[11] Award NO. 311-74/76/81/150-3.

[12] Award No. 180-64-1 , this is a non- oil and gas related case but the tribunal's approach is vital to this research.

[13] S.17(5) of the Oil Pipelines Act Chapter 338 Laws of the Federation of Nigeria 1990.

agreement but where the choice of law is omitted, the parties may struggle to have a legal certainty when disputes arise. Therefore, this chapter examines related cases from different jurisdictions to establish the court approach to settle the dispute in the absence of choice of law. And whether oil and gas agreement should be subject to local law of the host state in which the oil will be extracted.

It is worth noting that clauses in oil and gas contracts play vital roles and evidence have shown that the host states in developing countries are unilaterally taking measures which affect the rights of transnational corporation and thereby reducing the value of their investment. The justifications for such measures are varied and can be attached to rise in oil prices which prompted the host state to secure more profits than what they agreed when the contract was concluded.[14] Fabio posits further that expropriations and nationalisations increase when the price of oil increases and some countries in the developing world were making new law to legalise expropriation by arguing rights over country natural resources.[15] This was clearly illustrated in Venezuela in 2007 when the country adopted a law which allowed them to expropriate the two U.S. largest oil companies, ExxonMobil Corporation and Conoco Phillips, which then had no option but to abandon their multi-billion dollar investments in Orinoco basin in Venezuela.[16] The report further revealed that four other transnational corporations, including BP, Total S.A., Statoil and Chevron from the US accepted contracts that increased the Petroleos de Venezuela ('PDV') share in their exploration projects from 40 per cent to about 78 per

[14] Fabio Solimene, Political risk in the oil and gas industry and legal tools for mitigation, International Energy Law Review, 2014 page 81.

[15] ibid.

[16] Robert Pirog, The Role of National oil companies in the International Oil Market, Congressional Research Service Report for the Congress August 21, 2007, CRS RN RL34137.

cent.[17] This unusual measure reflects the imbalance of power between the host state and transnational corporations. Most nationalisations happened when prices of oil were high in the 1970s but when prices dropped in 1980 and the '90s, nationalisation vanished, only to resurface whenever prices were historically at high level.[18]

The petroleum contracts' concept was developed in international investment law to protect the interest of host states and transnational corporations and on this point, Bertrand argues that exploration and exploitation contracts have shown to be an effective way of ensuring transnational corporations are protected by minimising the host state power to set standards in terms of substance through administrative and legislative measures and jurisdiction through arbitration.[19] He argued further that the aforementioned measures have been challenged with the claim that the host state should be granted sovereignty in its relationship with transnational corporations. It is therefore important to reiterate that after the emergence of New International Economic Order ('NIEO') as well as the principle of sovereignty over natural resources, oil-rich producing countries began to sign a policy to take over their natural resources with the aim of getting benefit from their extraction. However, transnational corporations were not totally happy with such a measure because they too want to maximise their profits and the policy of nationalism led to conflicts between them and host states. Invariably, exploration contracts between the parties stipulate a long-term relationship regardless of the oil and gas contract types in recognition of three common features. Firstly, the associated risk that the relationship may be affected by contingent events such as political unrest or economic instability with

[17] Robert Pirog (n 16).

[18] Sergei Guriev, Determinants of Nationalisation in the oil Sector: A Theory and Evidence from Panel Date, Journal of Law, Economics, and Organisation, 2009 page 2.

[19] Bertrand Montembault, State sovereignty in international projects takes on a new lustre, International Business Law Journal page 291 – 292.

impact on the underlined exploration contract. Secondly, the projects involved intensive capital and lastly, the contracts are linked with high risks. For example, a change in government or law may lead to expropriation of the project and host states often capitalise on this. Bertrand added that the host state may make use of the inventors' expropriation dilemma to press for changes in the contractual equilibrium in its favour because of the awareness that investors have invested so much and would be unreasonable to abandon a large amount of sunk costs.[20] In addition, the principle of law of contract, the sanctity of contract is applicable to oil and gas agreements and it implies that contractual terms and conditions must be honoured while the minimum international standard of protection to be provided by host states to transnational corporations includes the requirement of good faith. This principle forms the basis of civil law obligations and provides that " the contract is the law of the parties, agreed to by them for the regulation of their legal relationship, and generates not only the obligation of each party to a contract to fulfil its promises, but also the obligation to perform them in good faith"[21] Pier pointed out that it is generally accepted that oil and gas contracts are capable of being breached under international investment law and cited expropriation as an example that is of primary concern for transnational corporations.[22] Expropriation is, amongst other things, one of the factors for the aim to stabilise the contractual obligations between parties to exploration and exploitation contracts. It is therefore pertinent to first discuss some of the associated risks with petroleum exploration activities before evaluating relevant clauses that need to be considered by the host state and transnational corporations in their respective oil and gas contracts.

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[20] Pier Giuseppe Pusceddu, Contractual Stability in the oil and gas industry: stabilization, renegotiation and unilateral state's undertakings, International Energy Law Review at 58.

[21] I.C.C Award No 5485 (1987), Yb. Comm. Arb., 1989, 156 at 168.

[22] Pier Giuseppe Pusceddu, Contractual Stability in the oil and gas industry: stabilization, renegotiation and unilateral state's undertakings, International Energy Law Review at 58.

4.2 Risks inherent in Oil Contracts

It is not disputed that the oil and gas contracts are vulnerable, and that unanticipated change of circumstances may occur to justify non-performance of a party's obligation under a petroleum contract. There are a number of potential risks associated with international petroleum contracts and these risks may not be comparable to risks in other types of agreement around the world. For example, geopolitical and technical problems may lead to unexpected delay particularly technical failure in oil and gas contract which may extend the life-span of exploration activities. It is noted that political unrest, revolutions, wars and embargoes amongst other things are causes of major interruptions in majority of oil-producing countries, including Arab states.[23] It is also argued that the host state participation in international petroleum contracts is the source of political risk because the outcome of such long contractual relationship is attached to the stability of the host state.[24] In addition, the likely risks from the host state's involvement may not be directly attributable to the state but to public interest requirement aspect of the contract which is always an issue in the oil and gas industry. Therefore, identifying the potential risks in international oil and gas contract which may affect the parties' ability to fulfil their contractual obligation is significant.

4.2.1 Political and economic risk

According to Onyejekwe, one of the challenges in oil and gas contracts are political and economic crises and the impact of this on the host state, in the absence of sustainable economic growth and development, a primary responsibility of government to its citizens.[25] To achieve this, a motivating environment for transnational corporations must be created by the host state and investment obstacles and impediments must also be eradicated. Perry posits that

[23] Yergin,D. The Prize, London, Simon and Schuster (1990) at page 790.

[24] ibid.

[25] Chisa Onyejekwe, Legal uncertainties and foreign direct investment: a case study of Nigeria, International Company and Commercial Law Review, (2018) at 125.

transnational corporations want to be assured of two important things; certainty and efficacy. She argues further that an inefficient legislation increases transaction costs and presents uncertainty and barriers to transnational corporations.[26]

Political risk has been described by academic writers as "the risk that a foreign government action will negatively affect the cash flows of a company conducting an international investment"[27] In another broad definition they say it is the risk that the country's government actions or imperfections of the country's executive, legislative, or judicial institutions adversely affect the value of an investment by a foreign firm in that country".[28]Similarly, Stephen argues that "political risks arise from the actions of national government which interfere with or prevent business transactions, or change the terms of agreement, or cause the confiscation of wholly or partially foreign owned business property"[29] It is observed from the above definitions that political risks can occur in various ways. It can be in form of a host state-initiated confiscation of transnational corporations' assets or output popularly known as expropriation, for example unexpected changes in the law to raise tax and petroleum royalties. This had been the case as consequences of independence after colonisation in the 1960s and 1970s as evaluated in chapter three under petroleum concession agreement. Besides, expropriation is regarded as the most popular of all the political risks that transnational corporations are vulnerable to in exploration project. It has been posited that expropriation may come in different forms such as new regulations, forced renegotiation, confiscatory taxes, changes in

[26] Amanda Perry, An Ideal Legal System for attracting Foreign Direct Investment? Some theory and Reality, American International Law Review (2000) 15 (6) at 1627.

[27] G Bekaert and others, Political risk and International Valuation, Journal of Corporate Finance, 37 (2016) at page 1.

[28] G Bekaert (n 27) at page 3.

[29] Stephen J Kobrin, Political Risk: A review and reconsideration, Journal of International business studies, 1979 at 67.

exchange rates and limit on the repatriation of currency.[30] Undoubtedly, identifying and understanding the potential risks that are likely to hinder the fulfilment of contractual obligations may help parties involved prepare for every eventuality and perhaps adopt appropriate methods to mitigate likely risks.

The case of Ecuador, Venezuela and Kazakhstan can be cited to show how host states have in the past expropriated oil operations. The President of Venezuela, Hugo Chavez, in 2007 issued a Decree requesting multinational oil companies in the country to sign a new contract with the national oil company known as Petroleos de Venezuela SA (PADVSA) and he was ready to expropriate their business interests if they fail to agree to new contractual terms. Venezuela eventually expropriated the business interests of ExxonMobil and ConocoPhillips mentioned earlier. Toeing the same line, Ecuador had in the past required transnational corporations operating within its territory to sign new subcontracting contracts designed to terminate the existing joint venture and with a clause aimed at preventing them from submitting appeals to the (ICSID).[31] Ecuador further increased tax rate up to 50 per cent on crude oil prices and expropriated occidental Petroleum's interest in an oil field.[32] It is also noted that the following oil producing countries; Algeria, Angola, Russia, Ecuador, Equatorial Guinea and Kazakhstan have increased taxes and royalties on oil and gas revenues substantially.[33] Anderson also added that Kazakhstan has taken some drastic measures by enacting a law that gave the host state power to unilaterally void or amend oil exploration and production contracts based on national

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[30] Hill C, *How Investors React to Political Risk*, Duke J Comp and International Law, (1983) at page 283.

[31] Ecuador Gives IOC's new contract deadline, Oil and gas Journal, (2008) at page 8.

[32] Zaldumbide Nationalisation of the Hydrocarbon Industry: Ecuador, Special Institute: International Mining and Oil & Gas Law, Development and Investment Rocky Mineral Law Foundation, 2007.

[33] Bowman JP, Trending Toward a New Round of Naturalisation: The Bolvian Oil and Gas Sector and Mining Sector Initiatives, Special Institute: International Mining and oil & Gas Law, Development, and Investment, Rocky Mineral Law Foundation, (2007).

security.[34] Consequently, measures such as these are capable of changing the economic equilibrium of a petroleum contract, a clear indication of an imbalance in the contractual relationship between the host state and the transnational corporations. In any exploration project, the parties have the responsibility to ensure the right balance is struck.

Furthermore, political risk covers the instability of a host state's legal system and policies as well as internal and external struggles, such as civil war, strikes and terrorism. It is not disputed that exploration projects are vulnerable to political risks regardless of any assurance provided by the host state in the underlined contract to protect transnational corporations against negative effect of political changes. Political risk occurs in different forms as understood from the above definition which makes it impossible for the host state to prevent the occurrence of certain aspect of political risks. Besides, other actors particularly the indigenous community are also involved in petroleum exploration apart from the host state and transnational corporations and these actors pursue different interests. The local community for example wants its needs to be considered and met in exploration projects. They may seek a fair distribution of oil wealth and might even demand to be involved in control of the oil sector. The Niger Delta in Nigeria can be cited as a good example to buttress this point.

The Niger Delta region is Nigeria's largest wetland, and the third largest wetland in the world. It has the highest crude oil resources in the Gulf of Guinea countries. The oil was first discovered in the area in commercial quantity at Olobiri in 1956.[35] However, Niger Delta people live below the poverty line despite the massive natural resources in the area. The report

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[34] Scot W Anderson, Expropriation, Nationalisation and Risk Management, Exploration & Production- Oil & Gas Review- OTC Edition, Touch Briefings (2008) at page 20.

[35] Available at <https://www.nnpcgroup.com/NNPCNusiness/BusinessInformation/OilGasinNigeria/IndustryHistory.aspx> accessed on 21 February 2018.

has further shown that the region has the largest unemployment and illiteracy rates in Nigeria and one of the largest in the world. The quality of life is reported to be very low due to the lack of health facilities and other important amenities. As a result, the local people have developed doubts regarding the Nigerian government's intention to meet the region's needs and accordingly transferred the aggression that had led to disruption of exploration activities towards the Federal Government. It is further reported that the instability in the Niger Delta region has prompted a negative reaction from multinational oil companies with significant numbers of oil production shut-down at oil fields and force-majeure declared due to the incidents of sabotage, oil theft, kidnapping, attacks and supply disruptions.[36] The Shell Petroleum Development Company of Nigeria Ltd (SPDC) declared force majeure on the 10th of October 2011 due to a sabotage of the Forcados pipeline. Another report further confirmed that a total of 189 crude oil thefts were dealt with between January and September 2013 alone, forcing SPDC to raise alarm on the rapid trend of crude oil theft which has led to constant closures of two pipelines within the same year.[37] The SPDC Managing Director also expressed the company's concerns over what he described as a social tragedy and a waste of the country's resources, confirming in his statement that Shell Nigeria finds it difficult to safely operate their pipelines without shutting down to prevent illegal connections.[38] Nevertheless, it can be asserted that cases of pipeline sabotage, theft, vandalism and supply disruptions can be avoided if the local people are convinced that the host state has not overlooked their interest in oil and gas contracts. They may then support the relevant contract, minimise associated political risk

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[36] Available at <https://www.shell.com.ng/media/2011-media-releases/forcados-force-majeure.html> accessed 21 February 2018.

[37] Available at< https://www.shell.com.ng/media/2013-media-release/spdc-raises-alarm-over-increased-crude-oil-theft.html> accesses on 21 February 2018.

[38] Shell website (n 37).

and invariably help the transnational corporations maximise their out-put with the extant stability.

However, economic risks are attributed to unanticipated circumstances that are likely to increase the cost of exploration projects. Alternatively, it could lower anticipated profits because exploration and production projects involve massive capital investment and require a long-term duration to be effective and profitable. Therefore, a fluctuation in oil price, a rise in the technical costs of exploration and recession or inflation in a host country may change the economic equilibrium of exploration project to the disadvantage of transnational corporations involved.

4.2.2 Natural and technical risks

Certain categories of risks may not be completely prevented and might even be beyond the control of either party to the petroleum contract. One can refer to cases of unexpected natural disasters to illustrate that some of the risks could not be reasonably avoided but can be controlled through clauses in the underlined contracts. For example, the unanticipated devastating flood, earthquake, storm and tsunami that struck the coast of Indonesia in 2004 which disrupted the shipment from LNG Plant in Indonesia to South Korea and Japan.[39] Similarly, in the case of ***Hilton Oil Transport v Oil Transport Co***[40]where the court affirmed an award of damages due to the destruction of the vessel by the storm. In respect of technical risks, it is observed from the Total publications[41] that exploration activities particularly the

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[39] Eric Watkins, Indonesian LNG spared harm from tsunami, Oil & Gas Journal, available at <https://www.ogj.com/articles/2005/01/indonesian-lng-spared-harm-from-tsunami.html> accessed 22 February 2018.

[40] Hilton Oil Transport v Oil Transport Co 659 So, 2d 1141 (1995).

[41] Total Annual financial report, Registration Document 2014 available at <https://www.publications.total.com/document-de-reference_2014_VA/risk-factors/other-risks/risks-related-to-oil-and-gas-exploration-and.html> accessed on 22 February 2018.

development of oil and gas fields, the drilling of production, construction of facilities and injection of wells requires advanced technology and are capital intensive. In addition, the oil company's ability to find or acquire and develop new oil reserves is not guaranteed and can be hindered by specific factors and risks such as unexpected drilling conditions, irregularities in geological formations, dry holes or failure to find anticipated commercial quantities of oils. There may also be cases of equipment failures, fires, blow-outs or accidents and lack of new technologies which may enhance access to previously inaccessible fields. It is further noted that any of these factors can easily lead to cost overruns for transnational corporations with great impact on exploration project which may adversely affect results of operation, financial condition and profits.[42]

The previous sections have demonstrated that the parties to the exploration contracts are known with specific types of risks and parties do not have equal standing, therefore a balance needs to be struck by allocating the associated risks among the two parties, the host state and the transnational corporations. The parties should consider inserting a number of clauses in oil and gas contracts so that they will be able to share future risks among themselves. The following paragraphs evaluate some of the relevant clauses in oil and gas contracts.

4.2.3 <u>Stabilisation clauses</u>

It is observed that the associated risks with the petroleum exploration and exploitation can be manged in different ways and it is normal for transnational corporations to protect their

[42] Total Annual financial report, Registration Document 2014 available at <https://www.publications.total.com/document-de-reference_2014_VA/risk-factors/other-risks/risks-related-to-oil-and-gas-exploration-and.html> accessed on 22 February 2018.

investment against risks. One of the ways this can be achieved is to spread the risk by involving other parties in the venture such as banks and industry partners or alternatively by diversifying operations according to Pier.[43] He recommended that transnational corporations should insert stabilisation clause after exploring and exhausting all other possible means to minimise the associated risks. One of the possible means is by obtaining political risk insurance from Multilateral Investment Guarantee Agency ('MIGA'), a member of the World Bank Group. The role of this institution is to promote and protect transnational corporations against non-commercial risks in developing countries and so far the organisation have issued more than $28 billion in political risk insurance for project not only in oil and gas industry but in a wide variety of sectors across the world.[44] In addition, the transnational corporations may maintain a low profile and involve the host state, through its national oil company, in the management of the project while demonstrating that they understand the host states' economic and social problems. However, it is significant to point out that including stabilisation clause in oil and gas contracts create a stable business environment.

From a scholars' perspective, stabilisation clauses are those clauses in private contracts between investors and host states that address changes in law in the host state during the life of the project[45] Fabio described it as the one which protects transnational corporations from sudden legislative change that can be enacted by the host state and have massive impact on the transnational corporations' investment.[46]Bernaedini also added that stabilisation clauses aim at

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[43] Total Annual financial report (n 42).

[44] Available at< https://www.miga.org/who-we-are > accessed on 27 January 2018.

[45] John G, Ruggie, Stabilisation Clauses and Human Rights, A research project conducted for IFC and the United Nations Special Representative of the Secretary-General on Business and Human Rights, May 27, 2009.

[46] Fabio Solimene, Production-sharing contracts, Joint Ventures and Service Contract: analysis and drafting considerations. International Energy Law Review. 2014 page 179.

safe-guiding transnational corporations by restricting the administrative or legislative power of the state to amend the contractual regulation or to annul the contract. Additionally, it is argued that the host states have seen stabilisation clauses as a means to create a favourable investment climate.[47] It is therefore, pertinent to examine categories of stabilisation clauses from transnational corporations' perspectives because these clauses contain certain risk-mitigation provisions to protect investment from likely risks such as expropriation, nationalisation or other circumstances on which the host state can capitalise to impose new law on foreign investors and their investments.

Stabilisation clauses are classed into three categories and they offer different protection to the transnational corporations. The first one freezes the law of the host state concerning the exploration and exploitation operation over the life of the contract and is known as freezing clauses. The aim of this clause is to ensure that the law applicable to the contract remain the same over the life of exploration and exploitation project. This puts on hold the fiscal regime on the day that the contract was concluded and stops any new law from being applied to the investment and investor. Maniruzzaman has pointed out that freezing clauses are not reliable because they cannot prevent the host state from exercising sovereign power in the public interest. Nevertheless, freezing clauses may enable the transnational corporations to receive compensation for breaching the clause and violation of their rights in underline contract.[48] It is worth pointing out that when exploration contract is governed by local law, the transnational corporations' interest could be at risk as the host state may change its law minimising the effect

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[47] Piero Bernardini, Stabilisation and adaptation in oil and gas investments, Journal of world Energy Law & Business, 2008, vol. 1, No 1 page 1.

[48] A.F.M. Maniruzzaman, The pursuit of stability in International Energy Investment Contracts: Acritical Appraisal of the Emerging Trends.J. OF World Energy L. & Bus., Vol 1, No 2 (2008) p. 124.

of clauses like stabilisation, particularly when the clause concerned is a freezing clause and stands on its own .[49]

The second category is economic stabilisation clauses which provide that the transnational corporations agree with new legislation with a promise of compensation to cover the cost and effects of the new law on their investment. This clause, also called economic balancing provisions,[50] does not prevent the subsequent new law rather it strikes the balance between the transnational corporation and the host state. For example, the clause requires that where the host state makes a new law which then affects the cost of the project in any form, the two parties engage in a dialogue to find a solution to the effects of the sudden changes and they can revisit the terms and conditions of the contract and make any necessary adjustment and the transnational corporation receives compensation accordingly. Similarly, the host state sovereign's power to legislate in the public interest may not be denied in the context of economic balancing provision particularly in investment relating to the extraction of natural resources. Thomas and George affirmed that the effects of host states exercising their sovereign-power for the public benefit in the presence of stabilisation clauses will depend on the type of clauses and the applicable law. They explain further that if the clause is invalid under the domestic law of the host state, international law may not resolve the problems.[51]

Finally, the hybrid clauses are the third category and reflect some aspects of the previous ones because the host state is required to put the transnational corporations in the same economic

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[49] F Garcia- Amador, the changing Law of International Claims (1984) page 394 Kazi Publications December 1984.

[50] Micheal Polking, Stabilisation Clauses and Periodic Review outline, Energy Charter Secretariat Organisation Internationale ENT E [BE] available at <http://energycharter.org/fileadmin/DocumentsMedia/Events/CCG_2015_Michael_Polkinghome.pdf> accessed on 28 January 2018.

[51] T Walde and G Ndi , Stabilising international investment commitments: International law versus contract interpretation. Texas International Law Journal, 31(2). Page 242 (1996).

condition as it would have been had the new law not been created and to exclude them. Some of the clauses outlined here and their effects on investments are examined below from oil and gas model of production sharing agreement from selected countries namely, Azerbaijan, Bolivia, Chile, Ecuador, Georgia, Nigeria and Turkey as well as relevant decided cases on stabilisation clauses.

The case of ***Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic***[52] is a good illustration of the stabilisation clause and its effects. The clauses say:

> "The Libyan Government, the (Petroleum) Commission and the competent authorities in the Provinces shall take all the steps that are necessary to ensure that the Company enjoys all the rights conferred upon it by this concession, and the contractual rights expressly provided for in this concession may not be infringed except by agreement of both parties "[53]
>
> "In case of modification to the tax regime, including the creation of new taxes, or the labour participation, or its interpretation, that have consequences on the economics of this contract, a corresponding factor will be included in the production share percentages to absorb the increase in the tax burden or in the labour participation of the indicated contractor. This correction factor will be calculated between the parties and approved by the Ministry of Energy and Mines"[54]
>
> "The tax regime, benefits, privileges and exemptions provided in any of the articles hereof, which shall be recorded in the special operation contract, shall remain invariable for the duration thereof"[55]
>
> "Should the income of the state or the Contractor be materially altered as a result of new laws, orders or regulations then, in such an event, the Parties shall agree to make the necessary adjustments to the relevant provisions of this contract, observing the principle that the affected party shall be restored to substantially some economic condition as it would have been in had such change in laws or regulations not occurred. The cost of such restoration to

[52] *Texaco Calasiatic v Government of Libyan* (YB Com Arb 1979, 177).

[53] Clause 16 of Deeds of concession concluded between Libya and two United States Companies, Texaco Overseas Petroleum Company and California Asiatic Oil Company between 1955 and 1968.

[54] Article 11.7 of the Ecuador's Model Production Sharing Contract for the exploration of Hydrocarbons and exploration of Crude Oil 2002.

[55] Article 12 and 12.1 of Chile Decree-Law 1089 of 1975.

> the other party may not exceed the benefit received by such other party as a result of such change"[56]

> "the tax regime, benefits, privileges and exemptions provided in any of the articles hereof, which shall be recorded in the special operation contract, shall remain invariable for the duration thereof"[57]

> " … the State Authorities [i.e. the host government, local authorities and state controlled or owned entities] shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent that the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of nay change (whether the change is specific to the project or of general application) in [Azerbaijan, Georgian, Turkish] Law (including any Azerbaijan Laws regarding Taxes, health, safety and environment) occurring after [date of the HGA or its ratification]… The foregoing obligation to take all actions available to restore the Economic Equilibrium shall include the obligation to take all appropriate measures to resolve promptly by whatever means may be necessary, including by way of exemption, legislation, decree and/or other authoritative acts, any conflict or anomaly between any project Agreement and such [Azerbaijan, Georgian, Turkish] Law"[58]

> "in Article 52 of the Hydrocarbons Law, the system of royalties and permits to apply to this contract shall remain fixed throughout its term"[59]

By incorporating the above clauses into oil and gas contracts, the host state has accepted that it will be bound by the terms of the contract. The host state also accepts that by exercising its legislative-power it will not take any measures or policy that will unilaterally change the conditions already agreed with the transnational corporations. The Libyan government in this

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[56] 1994 Nigerian Agreement (Unpublished) found in P. Cameron in International Energy Investment Law. The pursuit of Stability (2010), para. 2.40.

[57] Art 12 and 12.1 of Chilean Decree-Law 1089, 1975.

[58] Host State Agreement with Azerbaijan, Georgia and Turkey,Baku-Tibilsi-Ceyhan BTC Pipeline documentation.

[59] Art 12, Bolivian Model of Production Sharing Contract (1997).

case issued a Decree which nationalised the 51 per cent of the properties, rights and assets relating to the deeds of concession of the companies and the Decree declared further that the companies concerned were liable for all the liabilities and debts or obligations arising from their exploration activities. However, it was stated in the Decree that committee should be appointed to determine the companies' compensation, but no committee was formed. The case was referred to the arbitration according to the provision of the deeds and a sole arbitrator was appointed.

The sole arbitrator[60] first established the binding nature of the Deeds of Concession and he explained that, for the purposes of interpretation of and performance of the contract, it should be noted that a private contracting party has specific international capacity and he also considered the principles of Libyan Law as well as the principles of international law. The arbitrator found that the principles of Libyan law were in line with international law and eventually considered the concept of sovereignty and nature of nationalisation. The arbitrator reaffirms that the right of a state to nationalise is unquestionable. The question was whether the act of sovereignty which constitutes the nationalisation allows a state like Libya to disregard its international commitments expected by it within the context of its sovereignty. A distinction was made between nationalisation concerning citizens of the host state which is usually governed by the national law and nationalisation involving foreign party in respect of international contract that is governed by international law. Therefore, the arbitrator found that Libya had undertaken international obligations and as a result it cannot capitalise on its sovereignty to disregard commitment willingly undertaken through the exercise of sovereignty. The arbitrator pointed out that "the recognition by international law of the right to nationalise is not sufficient ground to empower a State to disregard its commitments, because the same

[60] Prof. Rene-Jean Dupuy (France).

law also recognises the power of a State to commit itself internationally, especially by accepting the inclusion of stabilisation clauses in a contract entered into with a foreign party".[61] The Arbitrator held that Libyan Government had granted a concession of 50 years minimum, and stabilisation clause 16 above does not affect the sovereignty of Libyan to make law in oil and gas activities in respect of other persons, the stabilisation only makes the new law inapplicable to the companies concerned for the duration of the concession, Libyan was then ordered to pay the companies $152 million of Libyan crude oil.

The binding nature of stabilisation clauses and its legality was maintained by the arbitrator in***Government of the State of Kuwait v American Independent Oil Company (Aminoil), Ad hoc Award***.[62] One of the issues before the arbitrator was to consider whether Kuwait's nationalisation was lawful considering the stabilisation clauses contained in the concession. On 19 September 1977, the Kuwait government issued a decree which terminated the oil concession and company's property was ordered to be reverted to the host state. Arrangement was made for the compensation committee to be set up to assess the compensation due to the American company and its outstanding obligation to Kuwait, the host state. There were certain provisions in the concessionary agreement through which a decision to nationalise can be legally challenged and the provisions to be considered are detailed below:

> The period of this Agreement shall be sixty (60) years from the date of signature"[63]
>
> "The Shaikh shall not by general or special legislation or by administrative measures or by any other act whatever annul this Agreement except as provided in Article 11. No alteration shall be made in the terms of this Agreement by either Shaikh or the company except in the event of the Shaikh and the Company jointly agreeing that it is desirable in the interest

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[61] Prof. Rene-Jean Dupuy (France) (n 60).

[62] Government of the State of Kuwait v American Independent Oil Company (Aminoil), Ad hoc Award, March 24, 1982, (1982) 21 I.L.M. 976.

[63] Article 1 of the concession Agreement of 1948.

of both parties to make certain alterations, deletions or additions to this Agreement"[64]

(A) Certain events … in which the Ruler of Kuwait would be entitled to terminate the concession"[65]

(B) Save as aforesaid this agreement shall not be terminated before the expiration of the period specified in Article 1 thereof except by surrender as provided in Article 12 or if the company shall be in default under arbitration provisions of Article 18.[66]

The tribunal found that there was a breach of the stabilisation clauses and held that the stabilisation clauses rendered expropriation[67] or nationalisation unlawful. In addition, the concession agreement concluded between the parties did not forbid nationalisation, but the stabilisation clauses prohibit nationalisation because Kuwait had undertaken from the provisions above, Art 17 not to modify the terms of the agreement or annul it. However, it eventually took a unilateral decision and terminated the concession which constituted a breach of the agreement. Consequently, the decision which emanated from this case reaffirm that stabilisation clauses cannot be overlooked, it must be honoured otherwise the expropriation will be unlawful.

4.2.4 Renegotiation clauses

Renegotiation clauses are defined by Patrick as a "contractual mechanism which enables the parties to review, discuss and adapt the terms of the contract either during an event specified

[64] Art 17 of the concession Agreement of 1948.

[65] Art 11 (A) OF THE Supplemental Agreement of 1961.

[66] Art 11 (B) OF THE Supplemental Agreement of 1961.

[67] Expropriation is defined as compulsory taking of property by a host state, which can be effected by an outright transfer of title, or by an interference that deprives the owner of the use or economic benefit of the property. In *Metalclad cop v Mexico* ICISD Case No.ARB (AF)/97/1 (NAFTA), Award, 30 August 2000 AT 103.

in the said clause or during intervals specified".[68] Similarly, Sornarajah simply put it as clauses which allow the parties to the underlined contract to renegotiate the terms and conditions of the agreed contracts in the event of major financial or physical changes in their circumstances which are likely to affect the business activities.[69] In addition, another writer defines renegotiation clauses as provisions in an agreement which provide when certain unforeseen circumstances oblige parties to the contracts to revisit the terms and condition of their contract.[70] Al-faruque also added that renegotiation clauses are necessary in international investment contracts between host state and transnational corporations because petroleum contracts are meant to cover long duration and there is a possibility that economic, political and social climate could change unexpectedly during the period and changes may alter the economic benefits that the parties had thought would flow from the contracts.[71] For example, when the prices of oil are high, the host state can decide to exert influence on the manner in which its oil and gas are exploited and sold. Particularly, when the host state perceived the underlined contract as unfavourable because of its weaker position at the time of negotiation and later discovered that the contract terms and conditions are too rigid and found itself in situation where it is very unlikely to fulfil its obligations, it can therefore, unilaterally cancel the contract. A renegotiation clause can then be relied upon to bring the transnational corporations back to the negotiating table to agree new terms and conditions. Therefore, this

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[68] Sangwani Patrick Ng'ambi, Efficient and Flexible: The Case for Renegotiation Clauses in Concession Agreement, 45 Zambia Law Journal, 1 (2014) at page 14.

[69] Muthucumaraswamy Sornarajah, *the International law on Foreign Investment*, 3rd ed, (Cambridge University Press, 2010), pp 169- 203.

[71] Abdullah Al Faruque, Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and stability, Journal of World Investment and Trade 9, 2008., 113-115.

type of clause enables the host state and transnational corporations to accommodate changes to the underlined contract.

Furthermore, it is pertinent to point out that renegotiation clauses are strikingly different from stabilisation clauses whose primary objective is to freeze the law for the entire duration of operation regardless of any changes in circumstances. On the other hand, the aim of renegotiation clause is to keep the relationship moving and alive by enabling the host state and the transnational corporations to strike the balance when it became apparent that circumstances have changed and there is justification for changes in the original obligations of the contract.[72] Professor Berger on this point posits that using a renegotiation as a tool to strike the right balance will benefit the host state because state's sovereignty will be intact and at the same time protect the transnational corporation against sudden changes in the law governing the petroleum contracts.[73] However, he further emphasised the possible drawbacks of renegotiation clauses from transnational corporations' perspectives. Firstly, they can refuse to have it in the contract and argue that such clauses reduce stability in the contract, increase overall cost of the transaction and could be used unfairly to amend the contract particularly, if the renegotiation clauses are triggered because of an event within the control of the host state.[74] He believes renegotiation clauses should not contradict the provisions of stability clauses for example, renegotiation clauses may allow the host state to unilaterally change the law whereas stability clauses prohibit such a move and if that happened, transnational corporations will be left with no option than to invoke the renegotiation provision. However, the supporters of the

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[72] Muthucumnaraswamny Somarajah, The settlement of Foreign Investment Disputes, Kluwer, Alphen aan Rijn, 2000 at 53.

[73] Klaus Peter Berger, Renegotiation and adaptation of International Investment contracts: The Role of Contract Drafters and Arbitrators, 36 Vanderbilt, J Trans'l L 1364 (2003).

[74] ibid.

renegotiation clauses have different views as one argued that they prevent the event of extreme consequences, a situation where the host state could not uphold its obligations stipulated in the agreement and took unilateral decision to terminate the contract. The renegotiation clauses may then come to their rescue because it would enable the parties to find a solution which will eventually facilitate trust and reliability between the host state and transnational corporations.[75]In addition, other commentators suggest that it is sensible to insert renegotiation clauses in a contract in a way to introduce flexibility by requesting that parties negotiate to resolve the problems where a change of circumstances happened.[76] However, in the absence of renegotiation clauses, the parties may still be allowed to renegotiate their agreement, either party would need to rely on the principle of changed circumstances also known as 'rebus sic stantibus'. It is argued that this principle is recognised under international law, Article 62 of the Vienna Convention on the Law of Treaties 1969 which provides that:[77]

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> (a) parties to be bound by the treaty; (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
> (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.

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[75] Abdullah Al Faruque (n 71) 36.

[76] Jill Poole and Adam Shaw-Mellors, Recession, changed circumstances, and renegotiations: the inadequacy of principle in English Law, Journal of Business Law, 2018 at 103.

[77] Article 62 of the Vienna Convention on the Law of Treaties 1969 available at <http://www.oas.org/legal/english/docs/vienna%20convention%treaties.htm > accessed on 04 February 2018.

Under the above principle, the parties to a contract may be under an obligation to renegotiate the terms of the underlying contracts if there is a genuine change in circumstances which affects the economic viability of the contract. Importantly, the above principle can only be applied in certain circumstances to prevent misuse. The International Court of Justice applies the principles only in exceptional circumstances. Similarly, the principle is recognised under the common law system, this is established through the doctrine of frustration when parties will be discharged due to circumstances[78] which made it impossible to fulfil their obligations under the contract. Lord Radcliffe however, shed some light on what could be classed as frustration where he says:

> … frustration occurs whenever the law recognises that, without default of either party, a contract obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foederaveni. It was not this that I promised to do.[79]

Similarly, it is noted from law literature that the application of doctrine of frustration requires question of law and fact as seen in the case of ***Edwinton Commercial Corporation v Tsavlris Russ***[80] where the Court of Appeal held that before the doctrine can be applied a range of factors and approaches must be considered; such as the terms and conditions of the contract, matrix of facts, their context, parties expectations and knowledge as well as their contemplations and assumptions about the certain risk. Thus, detailed analysis of terms of agreements and facts is

[78] Non-exhaustive list of common causes of frustration are change in the law or supervening illegality, impossibility, delay, death, War or strike as interruption, incapacity of a party and illness just to mention a few. .

[79] Per Lord Radcliffe in Davis Contractors v Fareham Urban DC, House of Lords [1956] 3 W.L.R. 37.

[80] Edwinton Commercial Corporation v Tsavlris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel) [2007] EWCA Civ 547; [2007]2 Lloyd's Rep 517.

necessary before applying the doctrine of frustration. In addition, under the English common law, there are situations where parties' claim for frustration will be rejected. For example, self-inducement and when it became apparent that the frustration is foreseeable.

Frustration can be perceived as self-induced in a situation where it is clear that the frustration occurred as a result of an act or election of the claimant. For example, when a party signs a number of agreements and is prevented from performing one or some of the contracts[81] as established in the case of ***Lauritzen A.s V Wijsmuller B.V (The Super Servant Two).***[82]This case involved a shipment of an oil-drilling rig from Japan to Rotterdam. The claimants were the right owners of an oil drilling rig that needs to be transported and defendant had signed a contract to transport it. Meanwhile, under the conditions of the contract, the defendants could ship the oil rig using one of either two ships called Super Servant One or Super Servant Two. The defendant chose the Super Servant Two because the other ship was being used for other purposes. However, the chosen ship sank in Congo 1981 while doing another contract. The defendant claimed that the contract had been frustrated due to the destruction of Super Servant Two, but the claimant argued that it was self-induced, and they should not be discharged. The Court of Appeal however ruled in the favour of the claimant and held that the defendant had chosen Super Servant Two and that the alleged frustration was caused by their selection and concluded that" it is within the promisor's own control how many contracts he enters into and the risk should be his".[83] In addition, the foreseeability factor needs to be considered because it makes it impossible to rely on doctrine of frustration; the challenge is to find what is and

[81] Hugh G Beale, Joseph Chitty, and Anthony Gordon Guest, *Chitty on Contract,* I, I, (London, sweet and Maxwell, (20012) para 23 of p. 62.

[82] *Lauritzen A.s V Wijsmuller B.V (The Super Servant Two)* , 1 Lloyds Rep I (Court of Appeal).

[83] ibid.

what is not foreseeable at the time of contract. The court also considered a claim of frustration in ***W J Tatem Ltd v Gamboa.***[84] In this case, the court looked into a charterparty of thirty days duration and the purpose of charter was to help evacuate the civil population fron North Spain to Ports in France from 1st of July 1937 to 1st of August the same year. The ship successfully completed one voyage before it was seized by the Nationalist on 14 July and kept until September 7 and redelivered to the owner on 11 September. Tatem then took the matter to the court claiming payment from 1st of August until 11 September. Gamboa however declined the liability and argued that the contract had been frustrated by the actions of Nationalists. The court found that the performance of the charter was frustrated from the moment the ship is seized and that the detention of the ship was unforeseeable, and the contract was frustrated because it was obvious that the foundation of the agreement had been removed as soon as the ship was confiscated by the Nationalists and nothing could be done to take it back. But the court found in ***Edwinton Commercial Corporation v Tsavlris Russ***[85] that the contractual risk was foreseeable and held that the contract was not frustrated even though the ship was unreasonably seized for three months. Although the multi-factorial approach discussed above was applied, the court pointed out that unlike in the World War I cases where the confiscation was of permanent bases, in this case the detention was mere a temporary one which can be resolved by negotiation between the vessel-owner and the authority which detained the ship for unpaid port dues. Frustration therefore must not be the fault of neither party and any supervening event must be unexpected. For a negotiation clause to be enforceable in English law, the courts expect a certain degree of precision and the clause must clearly state the circumstances which it will cover. The courts also require the clause to have a provision which stipulates the parties are negotiating in good faith about a specific issue, for example; the price.

[84] *W J Tatem Ltd v Gamboa* [1939] 1 KB 132.

[85] *Edwinton Commercial Corporation v Tsavlris Russ* [2007] EWCA Civ 547.

The decision which emanated from the following case ***Petro Inc, Petro-Deep Inc, SocietaArmamento Navi AppogioSpA V PetroleoBrasilero Sa Petrobras, Braspetro Oil Services Company, Den Norske Bank ASA***[86] confirmed the courts' position. The court held that in order for an agreement to be enforceable, there must be sufficiently complete and certain agreement on all eventual terms, which was not the case here. It is noted from the above case that the common problem with renegotiation clauses is the requirement of completeness and certainty according to English Common law. It is mandatory for the clauses to be clear and explicit in clarifying what needs to be renegotiated and its circumstances otherwise the clause is void and unenforceable as seen in House of Lords' decision in ***G Scammell and Nephew v HC&JG Ouston***.[87] In that case, it was held that the clause in the contract's terms between the parties was vague without precise meaning derived from it and it cannot be enforced. Similarly, the Court of Appeal decision in ***Mamidoil-jetoil Greek Petroleum Co SA V Okta Crude Oil Refinery AD (NO.1)*** [88] reaffirmed the court's position in a matter related to an agreement to agree and implied terms to award the contract for full term. In addition, there was a dispute resolution mechanism in the contract which provided that if there is any disagreement in connection with the contract and the parties fail to resolve it amicably, the matter should be referred to arbitration in London.

This case concerned the handling of crude oil in which Jet oil appealed against a judge at first instance decision[89] asserting that he had erred to conclude that ten years term in clause 7 of the initial contract was binding, the company wanted the matter related to the handling fee in future

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[86] Petro Inc, Petro-Deep Inc, Societa Armamento Navi Appogio SpA V Petroleo Brasilero Sa Petrobras, Braspetro Oil Services Company, Den Norske Bank ASA Case Nos: 2004 1912 A3 [2005] EWCA Civ 891.

[87] *G Scammell And Nephew v HC&JG Ouston* [1941] AC 251.

[88] *Mamidoil-jetoil Greek Petroleum Co SA V Okta Crude Oil Refinery AD* (NO.1)[2001] EWCA Civ

[89] [2000] 1 Lloyd's Rep. 554, [2000] 7 C.L 514).

to be decided by the court. Meanwhile, Okta argued that the initial decision was right because the 10 years term was not binding, and he argued further that the contract should not continue beyond 31/12/1994 unless the issue relating to handling of crude oil fee for future years could be agreed. However, they failed to agree, and the contract was terminated. The court allowed the appeal and explained that where no contract exists, the adoption of an expression such as to be agreed concerning important terms of the contract can prevent the contract from coming into existence because it was not certain. It simply means you cannot agree to agree. Meanwhile, the arbitration clause played a vital role in court's findings because the court stated clearly that where a contract left specific issues such as price to be settled over time, the presence of an arbitration clause can help the court to hold sufficient certainty by implying what was reasonable and the crude oil fee handling was resolved in favour of Jet Oil. Consequently, an enforceable renegotiation clause would make provisions for a remedy if there was a breach in the underlying contract.

Furthermore, it is also possible to renegotiate the terms of an oil contract where the contract does not provide such a clause to deal with a change in the equilibrium of the agreement by looking at force majeure clauses because they always provide for an obligation to negotiate and to overcome situations beyond human influence.[90] Pier added that force majeure clauses are inserted to extend the period of contract performance and as a precaution against risks associated with political, social and unforeseeable economic crisis. It is therefore important to look at example of this provisions below in Iraq's concession agreement concluded in 1999.

> In the event that the Petroleum Operations are delayed, curtailed or prevented due to Force Majeure for a period exceeding ninety (90) consecutive days, then the Term together with all rights and obligations hereunder shall be extended accordingly, subject to the provisions of Article 8, and the Parties shall meet shortly after a notice sent by the Contractor to SOC to, in good faith, agree on modifications to this Contract which will

[90] Klaus Peter Berger, Renegotiation and adaptation of International Investment contracts: The Role of Contract Drafters and Arbitrators, 36 Vanderbilt, J Trans'l L (2003) at 1348.

> enable the Contractor's rights and obligations to be restored. If the Parties are unable to reach an agreement on the possible modifications to be made to this Contract within thirty (30) days, such disagreement shall be submitted to arbitration in accordance with provisions of Article 37.4 to 37.8.[91]

It is observed that provision like the above can only benefit the host state which can rely on force majeure clause to renegotiate. This has led a commentator to express his concerns over the imbalance of such provision because the transnational corporations will be denied reliance on the contractual force majeure if there is force majeure event on the part of the foreign investors.[92] The dispute will be quickly referred to arbitration, however arbitrators are not ready to vary the agreements in the absence of contractual provision and the justification for that is the sanctity of contract, a common idea that once a contract is duly concluded between the parties, they must honour their contractual obligations. Whereas, a fundamental principle is that if an agreement cannot be honoured or fulfilled for any reason then it should not be unilaterally terminated by either party. All involved should resolve it amicably or take it to the arbitration. Nevertheless, force majeure can be relied upon if it occurred as a result of war, rebellion and strike. But a mere claim that contract has become unprofitable is not enough.[93]

4.2.5 Force majeure clauses

It is claimed that the two words 'Force Majeure' are borrowed from the French and literally means superior force, it is also known as casus fortuitous or chance occurrence.[94] According to the law dictionary, force majeure clauses can broadly be described as follows:

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[91] Article 31.4 of the Iraq Technical Service Contract for the Rumaila oil field 2009.

[92] ibid Berger above at 1353.

[93] ibid Berger at 1354.

[94] Hubert Konarski, Force Majeure AND Hardship Clauses in International Contractual Practice, 2003 International Business Law Journal (2003) at 408.

> The phrase is used particularly in commercial contracts to describe events possibly affecting the contract and that are completely outside the parties' control. Such events are normally, suppliers or subcontractors to supply the suppliers under the agreement and strikes and other labour disputes that interfere with the supplier's performance of an agreement. An express clause would normally excuse both delay and a total failure to perform the agreement.[95]

Furthermore, the Supreme Court of Canada also defined a force majeure clause in ***Atlantic Paper Stock Ltd v. St Anne-Nackawic*** as "An act of God clause or a force majeure clause… generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.[96] An academic writer says:

> Force majeure occurs when the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event.[97]

Force majeure is therefore, a clause that can be included in an agreement that is capable of freeing the parties to the contract from obligation and liability when contingent event occurred or circumstances which are beyond the control of the parties which may prevent them from fulfilling their obligations in the underlined contract.

It is pertinent, at this point, to look at the Court of Appeal's judgement on what counts as force majeure clause and whether the court of first instance had been right in the interpretation of the

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[95] Dictionary of Law, Oxford University Press, Market House Book ltd 1997.

[96] *Atlantic Paper Stock Ltd v. St Anne-Nackawic* [1976] I S.C.R. 580 at 583.

[97] A.H Peulinckx, "Frustration, Hardship, Force Majeure, Imprevision, Wegfall Der Geschaftsgrundlage, Unmoglichkeit, Changed Circumstances "3, No 2 (1986).

clause. In ***Great Elephant Corp V Trafigura Beheer BV Crudeesky***[98] the appeal court was required to study the operation of a force majeure clause whether the clause can exclude a party for unnecessary delay in the performance of its obligation within the contract and if performance was delayed by an unforeseeable act. The court ruled that if an act was with a party's control, it was likely that it was foreseeable. Therefore, the court held that they could not rely on a force majeure clause because it had been foreseeable that if necessary, documents to load the oil vessel were not obtained, the vessel would not be permitted to depart until right official clearance had been presented. The decision which emanated from this case established that parties may be able to rely on the force majeure clause if they could show that relevant events had been beyond the control of the parties. In addition, force majeure was described by Delaume as one of the many occurrences which is capable of calling for the adjustment of economic development contracts to new circumstances.[99] It is noteworthy that many grounds can trigger a force majeure clause in any concluded agreement as detailed above in the dictionary of law, therefore, it is necessary to look at these clauses in oil and gas concluded contracts before analysing its effects on host states and transnational corporations. Article 31 to 31.5 of the Iraq Technical Service Contract for the Rumaila oil field 2009 provides that;

> "The non-performance or delay in performance by either Party of its obligations or duties under this Contract shall be excused if and to the extent that such non-performance or delay is caused by Force Majeure".[100]
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> " The Party affected by force Majeure shall notify the other Party thereof, in writing within fourteen (14) days, stating the cause and the extent of effect of such Force Majeure and shall keep the other Party informed of significant developments. The affected Party shall use all reasonable

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[98] *Great Elephant Corp V Trafigura Beheer BVCrudeesky* [2013] EWCA Civ 905; [2013] 2 All E.R. (Comm) 992.

[99] G.R. Delaume, Excuse for Non-Performance and Force Majeure in Economic Development Greements, 10 Columbia Journal of Transnational Law (1971).

[100] Article 31.1 of the Iraq Technical Service Contract for the Rumaila oil field 2009.

> diligence to remove or overcome the Force Majeure situation as quickly as possible in a cost-effective manner".[101]
>
> Force Majeure shall mean any cause or event, unforeseen or beyond the reasonable control of the Party claiming to be affected by such event, and shall include , but without limitation, Act of God, war (whether declared or undeclared), force of nature, insurrection, riot, fire, and with respect to Contractor only legislation/order of the Government and other acts or circumstances beyond the control of either Party affected by it, provided always that such acts or circumstances are not attributable to the Party invoking Force Majeure or its Affiliates. The inability to pay monies due shall not constitute a condition of Force Majeure. [102]
>
> It is agreed by the Parties that the security conditions prevailing in the Contract Area on Contract signing date shall not constitute a condition of Force Majeure for either Party. The Parties also agree that the security conditions generally prevailing in the Republic OF Iraq on the Contract signing date shall not constitute a condition of Force Majeure for either Party unless these conditions prevent the implementation of Petroleum Operations.[103]

These examples are significant not only because they stipulate the parties' duties towards each other, but also because they serve as a reminder as to what may not constitute a condition of force majeure. The agreement was signed when the host state (Iraq) was in the process of rebuilding its country after the war so the clause made it clear that none of the parties can capitalise on the security issues and declare force majeure. However, some of the occurrences in the oil and gas industry can be cited to analyse force majeure clauses particularly arbitration related cases where tribunals had resolved contractual relationships hindered by man-caused incidents such as revolutions, wars, strikes, economic crises and supervening illegality. The revolutions in Iran can be cited as good example to explain circumstances to justify non-fulfillment of contractual obligations under the oil and gas contract. In **(JSA)*Phillips***

[101] Iraq Technical Service Contract for the Rumaila (n 100) at 31.2.

[102] ibid at 31.3.

[103] ibid at 31.5.

Petroleum Co. Iran V the Islamic Republic of Iran,[104] the oil company claimed compensation for the expropriation, by the host state, of its contractual rights under the 1965 concession agreement known at the time as Joint Structure Agreement. The Tribunal found that revolutionary circumstances in 1978 to 1979 had rendered contract performance impossible and the parties were released from their obligations. Similarly, in ***Mobil Oil Iran, Inc, et al. v Iran***,[105] the court followed the same approach and held that the revolution which happened between 1978 and 1979 created conditions of force majeure. However, the tribunal made a different decision in ***Sylvania Technical Systems, Inc., v the Government of the Islamic Republic of Iran***[106] which is non-oil and gas related case; however, the Tribunal's approach and reasoning cannot be overlooked. The claim in this case relates to a breach of contract in the so-called IBEX project. The company (Sylvania) was contracted to provide related secret military intelligence operations for Iranian Airforce Personnel to operate an electronic intelligence gathering data but Sylvania claimed that Iranian Government breached and repudiated the contract in 1979. The Iranian Government tried to allege force majeure due to the revolution's disruptive effects. However, the Tribunal argued that Iran could not be excluded from its contractual obligations because the non-performance of a contract had happened during the revolution. The claim was rejected because the revolutionary conditions had extended beyond expectation, five months after the new government had taken over the control of the country. The Tribunal examined whether revolutionary events were the major reason for the Iranian Government inability to perform its legal obligation but found that non-performance in this case was caused by the Iranian Government policy "not to continue with

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[104] *Phillips Petroleum Co. Iran v the Islamic Republic of Iran*, (Case No 39) AWARD NO 425-39-2.

[105] *Mobil Oil Iran, Inc, et al. v Iran,* Award No. 311-74/76/81/150-3.

[106] *Sylvania Technical Systems, Inc., v the government of the Islamic Republic of Iran* Award NO.180-64-1.

American contractor in a project related to secret military intelligent operations". The Tribunal subsequently refused to accept Iranian Government's claim of force majeure.

A claim for force majeure also failed in ***National Oil Corporation (Libya) v Libyan Sun Oil Company, Inc. (U.S.A.)***,[107] where the host state (Libya) was awarded damages for the oil company's non-performance of the exploration project. The parties signed an Exploration and Production Sharing Agreement (EPSA) on November 20, 1980 and the contract indicated that the Sun oil was to bear the cost of oil exploration. Sun Oil commenced exploration activities in 1981 and declared force majeure the same year 0n 18th of December 1981. The company invoked the force majeure provision on the EPSA due to the United State of America order which prevented U.S citizens from traveling to Libya with American passport. Therefore, the Sun Oil argued that the order made it impossible for its workers, all of whom were American citizens to go to Libya and as a result it could not continue with exploration activities. In addition, the Sun oil relied on another ground to justify the force majeure claim. There was a regulation in America in 1982 which banned importation from Libya and at the same time prohibited exports from America to Libya. The regulation further introduced an export licence for the export of some goods and technical information, and Sun Oil claimed that its export licence application was rejected and therefore capitalised on export regulation and refusal of licence as an extra event of force majeure. On the other hand, the Libyan National Oil Company disputed the force majeure claim and demanded continued performance. The Arbitral Tribunal held that, there had been no force majeure according to the exploration contract and awarded the host state twenty million U.S. dollars. The Tribunal found that Sun Oil was unable to provide proof that it could not be possible to employ non-America citizens' personnel either outside the Sun Oil's group or within. In addition, Sun Oil could not argue that it was not

[107] *National Oil Corporation (Libya) v Libyan Sun Oil Company, Inc*. (U.S.A.) No. 4462/AS/JRL.

possible to add non-US scientists to its scientific workforce and to deploy them to Libya when necessary to monitor the local work.[108]

War might be relied upon as a force majeure condition by the host state, thereby excluding it from contractual obligations, but the process is complicated because the court will be more cautious particularly, if a claim of force majeure is alleged by the host state in commercial contracts. The decision which emerged from the ***Serbian[109] and Brazilian[110] Loans cases*** established the court's approach. The court ruled that it cannot be satisfied that the war alone, despite its grave consequences on the economy, affected the parties' obligations in the contract. Similarly, the court is not willing to accept a claim of force majeure when the invoking host state is involved in a suspected war as seen in ***Michel Macri Case***.[111] The host state (Turkey) in this case sought to be freed from its obligations under the contract which the war had rendered its performance impossible. The tribunal examined the case and rejected the claim because of the host state's direct involvement in the alleged hostility. The court concluded that force majeure claim may succeed if it can be justified that performance of contractual obligations is impossible, but the mere assertion of greater burden would not suffice. Nevertheless, the host state claim for force majeure may succeed if civil or international war could constitute vis major conditions as established in ***Spanish Zone of Morocco claims***.[112]The court held in this case that revolts and mob violence can create cases of vis major.

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[108] National Oil Corporation Libya (n 107) at 593.

[109] Serbian Loans, Permanent Court of International Justice, series.A. No.20 (1929) at 33.

[110] Brazilian Loans, 1929, P, C, I,J Sereis A No 21 at 120.

[111] Michel Macri Case, 7 Trib. Arb. Mixtes 981 (1928).

[112] Spanish Zone of Morocco claims, Rapport 111 (1924), 2 UNRIAA, P.615, at p. 642. Transl.

Consequently, it is observed from all the cases discussed above that force majeure clauses are important, particularly in oil and gas contracts; it can protect both parties from contingent events and unforeseen circumstances outside usual exploration risks. It is established that the clause has some important implications when circumstances preclude fulfilment of an obligation under the contract as seen in Tribunal's decision in ***Phillips Petroleum Co. Iran V the Islamic Republic of Iran***[113] where both the host state and foreign oil companies were released from the contractual obligations due to revolutionary circumstances. Cases have also shown different approaches taken by tribunals to strike the right balance between the host state and transnational corporations. A claim of force majeure was unsuccessful in ***National Oil Corporation (Libya) v Libyan Sun Oil Company, Inc. (U.S.A.)*** because the tribunal found that Sun Oil had failed to justify the non-performance of exploration projects. Similarly, the host state failed to invoke a force majeure clause in ***IBEX Project*** examined earlier because the court found that non-performance of contract was due to Iranian government's policy not to work with American contractors. A force majeure clause is therefore an essential mechanism that can be relied upon to minimise the associated risks with a long-term contractual relationship in petroleum agreement. In addition, both the host state and transnational corporations can rely on the force majeure clause to absolve themselves of liability from an event of force majeure conditions. What matters most however is the careful drafting of the force majeure clause; the triggering events should be clearly defined with the circumstances of the parties and the detailed subject matter of the petroleum contracts. For example, information of interruptive events that are likely to occur in the context of exploration and exploitation contracts. Academic writers suggest that a force majeure clause should not be used as an escape clause; therefore the list of triggering events should be specific to allow the parties avoid

[113] Spanish Zone of Morocco claims (n 112) at 92.

obligations that cannot be fulfilled for reasons which lawfully could not be prevented.[114] They explain further that the list of triggering events must also not be so broad as to create an escape route to avoid obligations for which the party should be reasonably held liable. Additionally, a broad phrase of force majeure triggering events, if too broad, are likely to create ambiguity which the court can easily interpret against the party trying to escape liability as seen in the case of ***M.A. Hanna Co. v Sydney Steel Corp***.[115] In that case, the Supreme Court examined a force majeure clause in the contracts between the parties drafted by the claimant- M.A Hanna and invoked by the defendant- Sydney Steel. The court found that the claimant had inserted some broad phraseology in its description of force majeure events and therefore applied the *contra proferentem rule*, that is, where there is a doubt about the meaning of a clause in contract, the words will be construed against the party who drafted the clause.[116] The courts expect the party who imposes terms on the other party to make it simple and clear otherwise he would suffer the consequences. The court held that the broad wording of the clause create ambiguity which was eventually interpreted against the claimant and relieved the defendant from obligations. This case shows the effect of employing a broad phrase to define the force majeure triggering conditions whereas a carefully drafted clause may provide innovative solutions to address the consequences of such events. This is particularly relevant in a long-term petroleum contract that needs extra care with regard to the effects of force majeure due to the long period of the relationship between the host state and transnational corporations. It is therefore important that force majeure clauses reflect the accurate intentions of the parties whatever that intention may be. The force majeure clause must ensure triggering condition is

[114] Joni R Paulus and Dirk J Meeuwig, Force Majeure- Beyond Boilerplate, Albert Law Review, Vol. 37 (2) (1999) at page 305.

[115] *M.A Hanna Co v Sydney Steel Corp* (1995), 18 B.L.R. (2d) 264 (N.S.S.C.).

[116] America Law Institute, the scope of Contractual Obligations, Restatement Second of Contracts 1981.

beyond the party's control and such condition must be capable of rendering the performance of the contract impossible.

4.2.6 Arbitration clauses

Disputes in exploration projects arise even when the contracts are carefully drafted. The host states and transnational corporations should therefore, include arbitration clauses in their agreements to minimise the associated risks. If the breach is too costly, this mechanism can be relied upon to get a fair and final judgement. Final judgement reflects the binding effects of arbitration.

As defined in Halsbury's Laws of England, "arbitration is a process by which a dispute or difference between two or more parties, as to their mutual legal rights and liabilities, is referred to and determined judicially and with a binding effect by the application of law by one or more persons (the arbitral tribunal)".[117] Halsbury's definition is in line with provision of the ICSID Convention. Article 53 of the Convention states that an ICSID award is binding and final, it cannot be annulled or subject to any appeal unless the provisions under Article 52 of ICSID are satisfied.[118] Article 54 further provides that the ICSID contracting member must recognise an award as final and binding; the obligations imposed by the award must also be enforced as the final judgement in member state's court. In addition, Bradgate and White define arbitration as "a process whereby parties voluntarily refer their disputes to an impartial third person, an arbitrator, selected by them, for a decision based on evidence and arguments to be presented

[117] Halsbury's Laws of England, 4th ed-vol.2 Reprint (London: Butterworths 1986) at page 332 paragraph 601.

[118] The grounds in which ICSID can be annulled are as follows; (a) the tribunal was not properly constituted; (b) that the Tribunal has manifestly exceeded its power; (c) that there was corruption on the part of a member of the Tribunal; (d) that there has been a serious departure from a fundamental rule of procedure; or (e) that the award has failed to state the reasons on which it is based.

before him".[119] Similarly, Aust describes arbitration process as "the submission of a dispute to a judge or judges, in principle chosen by the parties, who agree to accept and respect the judgement".[120]

The above definitions highlight the features of arbitration as a consensual process which provides finality, involves private process and enables the parties to select their own arbitrator based on speciality in certain areas of investment. This aspect is significant as it raises concerns if arbitrators are not specialised in the oil and gas field, however, arbitration process allows the parties to select their own arbitrator, fashion their terms, conditions and rule of process which accommodate flexibility. This is why commercial arbitration is preferred to the adjudication scheme through a host state's national court particularly in Nigeria where litigation takes longer than usual as seen in the case of ***Nigeria National Petroleum Corporation v Clifco Nigeria Limited***.[121] In that case, the national court failed to make a decision on the disputed matter for three years, but the same case lasted only for twelve months at arbitral tribunal.[122]

Notwithstanding, there is a need to strike a balance between the host state and transnational corporations in oil and gas contract related disputes. It is noted that the host state would want disputes to be settled according to the local law in their local courts believing that judgement therefrom. Accordingly, countries like Ecuador argued that the submission of disputes to Arbitration engaged their sovereignty rights and eventually denounced the ICSID Convention

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[119] Robert Bradgate and Fidelma White, Commercial Law, Legal Practice Guides, (2009) Oxford University Press at page 123.

[120] Anthony Aust, Handbook of International law, (2005) Cambridge University Press at page 442.

[121] *Nigeria National Petroleum Corporation v Clifco Nigeria Limited* (2011) Suit No: SC.233/2003.

[122] Arbtral tribunal are the arbitrators which make decision on disputes.

in 2009.[123] It is argued that bias exists with one commentator pointing out that majority of disputes resolved by various international tribunals tend to prove biased against the host state particularly in developing countries.[124] Therefore, it is important to counter-balance the likely effects of arbitration in relation to the host state because the host state should enjoy the rights to regulate within its country regardless of any contractual relationship with transnational corporations. But Article 27 of the Vienna Convention on the Law of Treaties provides that domestic law cannot prevail over a treaty, and it must be respected regardless of the changes in local law. It is equally important to look at this from transnational corporations' perspectives. They are motivated by business interest and may not feel comfortable regarding disputes arising from their investments in a host state to being heard in that state following the host state law. Ximena however, concludes that it is difficult for arbitrators in investor-state disputes to guarantee fair treatment between the competing interests to the arbitration.[125] Nevertheless it is a requirement under the treaties that disputes arising under exploration contracts between the host state and transnational corporations be referred to the ICSID arbitration for settlements. For transnational corporations to begin ICSID arbitration against host state, that state must have been a member or party to the ICSID Convention, a separate legal mechanism which is totally different from BITs (1965). It is further observed that consent to ICSID is required before an action can be initiated, thus the host state must have given the consent to the transnational corporations in exploration agreement and the investor on the other hand must have expressed its consent by simply requesting arbitration otherwise the ICSID would not have jurisdiction to hear the case. Invariably, for a Tribunal on behalf of ICSID to

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[123] Available at <https://www.unctad.org/en/Docs/webdiaeia2016_en.pdf> accessed on 11 March 2018.

[124] Ximena Herrera-Bernal, Arbitral jurisprudence: the arbitrator's concerns about treating the parties equally and taking into account the needs of the state/or concession authority, International Business Law Journal, (2013) page 306.

[125] ibid.

have jurisdiction some conditions must be satisfied. These include that the dispute concerned must arise out of an investment, the transnational corporation must be a national of another ICSID member State which also applies to the host state and that there must be consent from both parties regarding the dispute which is referred to as “perfected consent”.[126] In furtherance of the foregoing, it is pertinent to examine some of Nigeria’s legal mechanism for arbitration in the petroleum industry.

4.2.7 Arbitration in the Petroleum Industry in Nigeria

It is noted from the database of ICISD member states that Nigeria is among the contracting members around the world that have opted for arbitration to settle disputes arising from investments. Specifically, Nigeria signed ICSID on July 13th, 1965, ratified it on August 23rd, 1965 and it came into force on October 14th 1966.[127] Apart from been a contracting party to the ICSID, Nigeria has further enacted many laws to give effect and promote arbitration, particularly, for the settlement of disputes in the petroleum industry. Some of the Nigerian Acts of Parliament are as follows; Oil Pipeline Act 1958, Petroleum Act 1969, Nigerian LNG Fiscal Incentives Guarantees, Arbitration and Conciliation Act 1990, Assurance Act 2004 and the Nigeria Investment Promotion Commission Act 2004 [128] just to mention a view. These laws are recognised and applied throughout the thirty-six (36) States across the country with the sole purpose of providing a unified legal mechanism for the efficient and fair settlement of investment disputes. Some of the Acts declare that Arbitration should be chosen for settlement

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[126] Ximena Herrera-Bernal (124).

[127] Available at< https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx accessed on 11/03/2018> accessed 23 August 2017.

[128] This Act recognises the provision of other laws and it made clear at s.34 that this Act must not affect any other law by virtue of certain investment disputes may be and may not be submitted to arbitration it all depends on the provision of that or another law.

of investment disputes. For example, Section 26 of the Nigeria Investment Promotion Commission Act provides that:

(1) Where a dispute arises between an investor and any Government of the Federation in respect of an enterprise, all efforts shall be made through mutual discussion to reach an amicable settlement.
(2) Any dispute between an investor and any Government of the Federation in Respect of an enterprise to which this Act applies which is not amicably settled through mutual discussions, may be submitted at the option of the aggrieved party to arbitration as follows-

(a) in the case of a Nigerian Investor, in accordance with the rules of procedure for arbitration as specified in the Arbitration and Conciliation Act; or

(b) in the case of a foreign investor, within framework of any bilateral or multilateral agreement on investment protection to which the Federal Government and the country of which the investor is a national are parties; or

(c) in accordance with any other national or international machinery for the settlement of investment disputes agreed on by the parties.

(3) Where in respect of any dispute, there is disagreement between the investor and the Federal Government as to the method of dispute settlement to be adopted, the International Centre for Settlement of Investment Disputes Rules shall apply.[129]

Similar provisions to the above can be found in the leading legislation regulating the petroleum industry in Nigeria. The Petroleum Act. S.11 (1) and (2) of the Act provides that:

(1) Where by any provision of this Act or any regulations made thereunder a question or dispute is to be settled by arbitration, the question or dispute shall be settled in accordance with the law relating to arbitration

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[129] Section 26 of Nigeria Investment Promotion Act, (Decree No 16 of 1995) Laws of the Federation of Nigeria Available at https://www.nigeria-law.org/Nigerian%20Investment%20Promotion%20Commission%20Act.htm accessed on 11/03/2018

> in the appropriate State and the provision shall be treated as a submission to arbitration for the purposes of the law.
>
> (2) In this section "the appropriate State" means the state agreed by all parties to a question or disputes to be appropriate in the circumstances or, if there is no such agreement, the Federal Capital Territory, Abuja.[130]

The Nigeria Oil Pipeline Act also provides that:

> Every licence shall be deemed to include a provision that any question dispute arising between the President or the Minister and the holder of the licence or any matter connected therewith shall if it cannot be resolved by agreement be referred to arbitration.[131]

The Arbitration and Conciliation Act 2004 has had a tremendous impact on oil and gas agreements in Nigeria. This Act is the national arbitration law of Nigeria,[132] it was enacted and solely based on the United Nations Commission on the International Trade Law (UNCITRAL) with slight differences. Having signed the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Arbitration and Conciliation Act (ACA) incorporated Nigeria's obligations under the Convention. Nigeria also signed other regional conventions such as Economic Community of West Africa States Energy Protocol which provides that disputes between the host state and transnational corporations should be referred to the International Centre for Settlement of Investment Disputes (ICSID) provided that the host state and the country of origin of transnational corporation are parties to the ICSID Conventions.[133]The ACA is however the only legislation in Nigeria which governs both national and international arbitration. There are many arbitral institutions in Nigeria including,

[130] Petroleum Act Chapter P10 (Chapter 350 LFN 1990) Laws of the Federation of Nigeria. Available at <https://www.resourcegovernance.org/sites/default/files/documents/nigeria-petroleum-act.pdf> accessed 17 March 2018.

[131] Section 17(5) of the Oil Pipelines Act Chapter 338 Laws of the Federation of Nigeria 1990. Available at https://www.nigeria-law.org/Oil%20Pipelines%20Act.htm accessed on 17/03/2018.

[132] Each state in Nigeria is free to enact its own arbitration law. Lagos State in 2009 created the Lagos State Arbitration Law which is applicable to all arbitrations in Lagos State unless another law is chosen by the parties within the agreement.

[133] Article 26 (4) (a) (i) of the Economic Community of West African States Energy Protocol 2003.

the Chartered Institute of Arbitrators UK, Nigeria Branch, the International Chamber of Commerce, the Regional Centre for International Commercial Arbitration Lagos (RCICAL),[134] the Lagos Multi-door Courthouse,[135] the Nigeria Institute of Chartered Arbitrator and the Lagos Court of Arbitration just to mention a few. It is important to point out that each of these institutions are operating respectively under their rules covering arbitration and disputing parties may choose any of them and be governed by their respective rules rather than the ACA rules. However, for the arbitration agreement to be valid under ACA, it must be written and signed or contained in an agreement entered by the parties.[136] The parties need to have legal capacity to sign the agreement and the agreement must relate to a business relationship. As stated in Section 48 of the Act, the arbitration agreement must relate to a dispute capable of settlement by arbitration under laws of Nigeria.[137] This provision makes it clear that the arbitration agreement must be valid and enforceable under the law to which both parties have chosen. Otherwise, the court may set aside an arbitral award aside by virtue of s.48 (a) (ii) of ACA.[138] In addition, ACA provisions exclude certain categories of disputes, for example domestic disputes, anti-trust disputes, nullification of patent rights and competition disputes, all of which are not arbitrable. Therefore, only disputes arising from business activities may be referred to arbitration and they are clearly stated in the definition of commercial disputes and arbitration. S.57 of the Act provides that:

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[134] The centre was established in 1989 under the auspices of the Asian African Legal Consultative Organisation, it is a non-profit, independent, international Arbitral institution, the aim of the centre is to provide neutral place for the resolution of disputes arising out of international business activities by arbitration and most importantly to encourage settlement of disputes within the region where the business activity took place.

[135] LMDC is the first court-connected Alternative Dispute Resolution centre in Africa. it is a non-profit private establishment created to facilitate dispute resolution within the Nigeria.

[136] Arbitration and Conciliation Act 2004, Section 1.

[137] Arbitration and Conciliation Act (n 136) at S.48 (b)(i) and s.52 (b) (i) respectfully.

[138] Arbitration and Conciliation Act (n 136) s.48 (a) (ii).

> …commercial means all relationships of a commercial nature including any trade transaction for the supply or exchange of goods or services, distribution agreement, commercial representation or agency, factoring, leasing, construction of works, constructing, engineering licensing, investment, financing, banking, insurance, exploitation, agreement or concession, joint venture and other forms of industrial or business co-operation, carriage of goods or passengers by air, sea rail, or road.[139]

As noted above, certain disputes are excluded from arbitration, it is therefore, pertinent to visit some decided cases in oil and gas to explain the categories and perhaps some of the exception to the rules. The Federal High Court of Nigeria ruled in ***Federal Inland Revenue Service V Nigeria National Petroleum Corporation & 2 ors***[140] that an arbitral award under a Joint Operating Agreement between the host state (Nigeria) and transnational corporations was voidable on the ground that the main disputes of arbitration which include application and interpretation of Company Income Tax Act, Petroleum Profit Tax Act, Education Tax Act and Deep Offshore Act are not arbitrable and held that it was a tax dispute and that the arbitral tribunal had no jurisdiction to rule on the case. The Court then declared that a tax dispute was government's function which must be executed exclusively by the Federal Inland Revenue Service. The decision which emanated from this case indicated that tax related disputes are not arbitrable under ACA but decisions taken in recent similar cases have revealed that the Court had taken a different view. In ***Esso Petroleum and Production Nigeria Limited & Anor v. NNPC***[141] ***and Shell Nigeria Exploration and Production &Ors v FIRS & Anor***[142] it was decided that disputes arising out of the parties' rights and contractual obligations were contractual disputes not tax related disputes, therefore arbitrable. The Esso case involved a

[139] Arbitration and Conciliation Act (n 136) s.57 (1).

[140] *Federal Inland Revenue Service V Nigeria National Petroleum Corporation*& 2 ors Suit No. FHC/CS/774/2011.

[141] *Esso Petroleum and Production Nigeria Limited & Anor v. NNPC* Appeal NO. CA/A/402/2012.

[142] *Shell Nigeria Exploration and Production & Ors v FIRS & Anor* No. CA/A/507/2012.

Production Sharing Agreement (PSA) concluded between the transnational corporations (Esso Exploration and Production Limited, Shell Exploration and Production Limited) and the host state through its national oil company (Nigeria National Petroleum Corporation) to explore oil from an oilfield. The PSA stipulated how the petroleum produced from the oil field was to be allocated. It further stated that oil tax and royalty tax was to be lifted by the host state and by virtue of the contract, transnational corporation was to lift the cost oil and both parties were responsible for the lifting of profit oil according to the lifting allocation unilaterally prepared by the transnational corporations within the contract. In addition, the transnational corporation also had the exclusive right under the PSA to prepare tax return and pass it on to the host state for submission to the Federal Inland Revenue Service. But despite the provision under the PSC, the host state was lifting unilaterally more tranches of oil and tax oil than it was allocated by the transnational corporation in the contract. The act was considered to be a fundamental breach of contract and transnational corporation took the matter to arbitration for declaratory order that there had been a breach. They sought an order to stop the host state from further unlawful over-lifting of oil cargoes and from submitting further tax returns which are made-up and contradicted the one that was prepared by the transnational corporation. In addition, they further demanded that the host state should be ordered to refund the over lifted crude oil. The Federal Inland Revenue Service (FIRS) challenged the jurisdiction of arbitration and argued that the case was tax related matters which were within the Nigerian court's jurisdiction. FIRS further applied for court declaration that a judgement of the award by the arbitral tribunal would have negative impact on its ability to collect tax and therefore sought an order to exclude tax related issues from arbitration agreement. The transnational corporations however argued that the Federal Inland Revenue Service was not a party to the underlined exploration agreement and that the arbitration action was initiated against the transnational corporation not against FIRS and therefore had no right or capacity to intervene in the matter (*locus standi*). Initially, the Nigerian Federal High Court decided the case in favour of FIRS concluding that the case was a tax related matter therefore was not arbitrable. But the transnational corporations appealed against the ruling and took the matter to the Appeal Court and argued that the judge had erred and contended that the arbitration claim was a contractual matter not a tax related case. They pointed out that the PSA stipulated how produced oil was to be shared between the parties and that the arbitration was initiated against the host state because of its breach of PSA, by unilaterally lifting extra cargoes of produced oil than it was supposed to lift under the initial lifting allocation prepared by the transnational corporations. The host state argued that it was a tax related matter. The filing of Petroleum Profit Tax returns (PPT) which was required under the Nigeria Petroleum Profit Tax Act 1990.[143] Section 3 (1) (a) of the PPTA provides that;

> … the due administration of this Act and the tax shall be under the care and management of the Board which may do all such as may be deemed necessary and expedient for the assessment and collection of the tax and shall account for all amounts so collected in a manner to be prescribed by the Minister.[144]

It was further submitted that the transnational corporations' claim against the host state was mere argument that they have been over taxed in relation to royalty and tax oil which was a statutory duty and if the case is decided in their favour, it would affect the host state's statutory duty and contractual obligation under the PSA to file correct Petroleum Profit Tax returns as required by law. The Court of Appeal held that the dispute in this case involved contractual obligations of the parties and the court noted that there had been a breach of contract. Additionally, the host state through its representative, NNPC had violated the agreement provisions by unilaterally preparing the Petroleum Profit Tax returns contrary to the provision of PSA, so it cannot be argued that the dispute was only a tax dispute. Therefore, the primary

[143] S.3 (1) (a) of the Petroleum Profit Tax Act 1990, CAP.354 LFN. Available at <https://www.firs.gov.ng/Tax-Management/Tax%20Legislation/PPTA.pdf> accessed on 20 March 2018.

[144] ibid.

issue before the arbitral tribunal was to establish the breach of the host state's obligations under PSA. The court also pointed out that some of the disputes referred to arbitral tribunal for reliefs relate to tax disputes and therefore upheld the decision on ESSO above that some of the claims raised tax issues and therefore, were not arbitrable. The Court further explained that the transnational corporations sought an order that would debar the host state from making tax returns and such relief engages the rights and discretionary power of Federal Inland Revenue Service to fulfil its duties and obligations vested by the country's Petroleum Profit Tax Act stated above.

The above case established that disputes arising out of petroleum exploration agreements such as PSA in this case can be referred to arbitration unlike the court's position in Esso v NNPC and SNEPCO V FIRS discussed earlier, where the court ruled that the disputes were tax related matters and were not arbitrable. In addition, the ruling in this case offers a glimmer of hope for transnational corporations in relation to arbitration clauses particularly, Nigeria PSAs which may raise concerns about tax implications due to allocation of tax oil and many tranches of produced oil. Relying on this case, it could be suggested that arbitral tribunal will be allowed to investigate disputes arising out of oil and gas contracts even if the disputes concerned related to tax obligations. However, it was made known from this case that tax disputes are not arbitrable but the fact that the present case was not entirely tax dispute, it involved contractual obligations under the contract, as a result, the court was able to distinguish it and deviated from its previous position that tax related disputes were not arbitrable. This position has temporarily changed in the case discussed in the next paragraph.

The exception to the above rule emerged from the case of ***Statoil (Nig) Ltd v Nigerian Petroleum Corporation,***[145] where the court of Appeal ruled that jurisdiction of arbitration

[145]*Statoil (Nig) Ltd v Nigerian Petroleum Corporation* (2013) 14 NWLR (Pt. 1373) 1 at 29

depends on the provision under the underlined agreement between the parties and their consent. The court highlighted in this case that it does not matter if disputes are related to tax matters, as far as the parties agreed to refer the case to arbitration the parties' wishes should be honoured and respected. The position of the court on this case was also upheld in ***Nigeria Agip Exploration Ltd v NNPC & Anor.*** In this case the appellant (Agip) and respondents are parties to an exploration contract, Production Sharing Agreement 1993. The agreement contained an oil sharing formula and further provided that disputes relating to the interpretation or performance of the contracts should be referred to arbitration according to the provision of ACA. So, when disputes eventually arose, the arbitration clause under the agreement was initiated asking the arbitral tribunal to interpret the performance under the PSC and accordingly, the arbitral tribunal ruled in favour of the appellant and issued partial award on the issue of liability. On the issue of monetary reliefs, the arbitral tribunal requested for an updated and revised damages in order to issue final award. However, the respondent was not pleased with the partial award and was concerned about the likely subsequent final award. The respondent tried to block the award and applied for an injunction to stay further proceedings in relation to the arbitration and an order that will stop arbitral tribunal from taking any steps or obtaining information that will enable them to issue final award. However, the court declined to grant an injunction relying on the Provisions of s.34 of the Arbitration and Conciliation Act and argued that proceedings of arbitral tribunal should not be blocked by a court order. It is noted from this decision that the NNPC tried hard to frustrate the arbitral proceedings because the decision was not favourable, meanwhile the objective and purpose of arbitration would have been defeated if the injunction was granted. The court's attitude in this case point towards a positive development and effort to make arbitration an alternative to litigation. However, it was quite unfortunate that a recent decision from the Court of Appeal has created doubt whether oil and gas related disputes in Nigeria would be subjected to arbitration. The following case demonstrates the country position.

The Court of Appeal in Nigeria ruled in ***Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service & Anor***[146] that a third party had right to challenge an arbitration award. It is obvious that FIRS was not a party to the exploration agreement which contained arbitration clauses but successfully frustrated arbitration proceedings. This case concerned dispute over tax payment concerning oil lifted under the exploration agreement (Production Sharing Agreement 1993). NNPC was initially granted an injunction against the arbitration proceedings since tax disputes cannot be referred to arbitration under Nigeria law. However, the injunction was overturned by the Appeal Court in Lagos State. But the Federal Inland Revenue Service ('FIRS') was not happy with the Court of Appeal decision and decided to challenge the validity of arbitration agreement between the NNPC, Texaco and Statoil. In addition, FIRS was not a party to the arbitration agreement but claimed that the arbitration was initiated to avoid the proper calculation of taxes accruable to its account. The Court of Appeal in Abuja accepted FIRS argument and recognised that FIRS had right (locus standi) to challenge the arbitration agreement. The court argued further that if the transnational corporations were successful with arbitration proceedings, the FIRS would be affected and loses income with the arbitral award. The significance of the court decision in this case is that it showed how judges are deviating from their primary function which is to apply and interpret the law. They have attempted to create new law with such a decision and the only justification was that subsequent arbitral award would impede FIRS constitutional and statutory power to collect tax. The decision was not stated in any of Nigeria statute not even the leading Act of parliament on arbitration matters,

[146] *Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service 7 Anor* (2014) LPELR-23144 (CA).

The Arbitration and Conciliation Act 2004. It is however noted that court's decision in the above case appears to go against provisions of the law; s.34 of ACA provides that:

"a Court shall not intervene in arbitral proceedings in any matter governed by this Act except where so provided in this Act"[147]

The above cases have shown that Nigerian courts have applied a number of principles to consider the arbitrability of tax related disputes. Nigeria arbitration law failed to provide excluded activities in terms of arbitration and there is no binding international law except New York Convention which outlines disputes that are capable of settlement by arbitration and can be referred to arbitral tribunal. It is noted from dispute cases in Nigeria that only commercial transaction disputes are arbitrable but tax disputes in the petroleum industry are not subject to arbitration. Therefore, arbitration in the country cannot be predicted since judges can overturn the decision overnight. Accordingly, transnational corporations should be aware of the associated risks with Nigeria arbitration when negotiating exploration agreement particularly the arbitration clauses. The governing law of the agreement plays a key role in arbitration and its proceedings; thus, it is pertinent to discuss the significant of law applicable to the contracts. This is now considered.

4.2.8 Choice of Law clauses and considerations in oil agreements

This section discusses choice of law clauses which determine what law applies to a petroleum agreement and any disputes arising out of the agreement. The distinction between governing law and jurisdiction cannot be overlooked. It is pertinent because it is certain that agreements will produce disputes from time to time and when this happens the likely questions is where to sue, which country's court is authorised to hear the case and which country's law will be applied to settle the dispute. Thus, this research focuses on the factors to be considered by the

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[147] Section 34 of Arbitration and Conciliation Act 2004.

host states and transnational corporations in establishing the applicable law in oil and gas agreement. According to Vickers “the choice of law clause indicates a body of law to govern the contract in the event of legal problems between the parties”.[148] It is noted from Vickers’ definition that the choice of law clause is not a dispute resolution mechanism; it does not state how disputes between the parties will be settled, but provides information about the applicable law to be applied when disputes arise on the parties’ rights and obligations under the contracts. It is also observed that choosing the appropriate law is very significant and if properly considered, the choice of law clause can be an important mechanism to strike the right balance between the host state and transnational corporations particularly in oil and gas agreements. It may help to provide some certainty when settling commercial disputes. Choice of law clauses contribute to their harmonious relations and assures more predictable litigation results.[149] In addition, where the choice of law is not mentioned in an agreement, the parties may find it difficult to have a legal certainty when disputes arises about which law is applicable to settle the disputes and where to sue, that is, which state’s court has jurisdiction to hear the matter. Inserting an arbitration clause in oil and gas agreement may not necessarily assure a certainty on its own as established in decided cases under arbitration above where local courts have developed numerous principles to frustrate the arbitration proceedings despite clear indication in the exploration agreement that disputes should be referred to arbitration for final settlement. However, it is important to point out that parties to exploration agreement are free to decide what laws would be applicable to their agreement under the principle of autonomy.

4.2.9. Party autonomy

The above doctrine is embraced by the United Kingdom and United States of America including developing countries and is viewed as contractual freedom. It is submitted that most

[148] Alice M Vickers, ‘The Choice of Law Clause in Contracts between Parties of Developing and Developed Nations’ (20140, 11 Ga. J. Int’l & Compl. L. 617 19810.

[149] ibid.

of the legal systems in developed countries recognise the concept of party autonomy. For example, in the United States of America, The Second Restatement of the Conflicts of Laws and Uniform Commercial Code give due regard to party autonomy. In addition, under English Common Law for example, the intention of the parties to the agreement determines the proper law of the agreement. However, it is pertinent to note that the common law approach would be appropriate if the contract was entered into prior to 1st of April 1991 but if the contract was entered into after this date and up to 2009 the contract will be governed by the Rome Convention and subsequent contract after December 2009 is governed by Rome I Regulations as examined below. Therefore, party freedom is beneficial by allowing the parties to choose a law that can meet the needs of their contractual relationship. One academic writer defined party autonomy as a doctrine which allows the intention of the parties to govern validity of an agreement.[150] However, critics argued that party autonomy is not in the best interest of developing countries and the justification for this argument was the unequal bargaining power between the parties. The transnational corporations however have always succeeded in that respect due to their bargaining strength. Additionally, allowing transnational corporations to choose any law can lead to a situation whereby the outcome will benefit the transnational corporations but against economic interests of the host state. It was further submitted that transnational corporations who are willing to engage in transnational business activities should also surrender to host states laws, they should understand that the host states are typically familiar with domestic legislation and perhaps have little or no knowledge of other system of law.[151]Therefore, exploration agreement that fails to give considerations to the domestic laws and policies of the host state should be avoided.

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[150] Alice M Vickers (n 148).

[151] ibid.

On the other hand, supporters of party autonomy have expressed contrary views. For example, Roffe posits that exploration agreement cannot be treated as a domestic business activity; therefore, the host state should live up to expectation and operate in accordance with international acceptable standard. Any disputes arising out of petroleum agreement should not be tied down to one law; parties should be free to select what law to govern their oil and gas agreement. [152] He argued further that the national courts are likely to be biased in favour of the host state, they may give preference to their local laws and thereby discriminate against the transnational corporations. The concept of national sovereignty over natural resources and ability to make law beneficial to the state have been regarded as driving force behind the host states preference of domestic law as the applicable law to the exploration agreement. Transnational corporations often believe that the commercial laws of host states particularly, the developing countries are commercially restrictive and temporary.[153] Lynch added that there is an underlying attitude of doubt on the part of developed countries concerning the settlement of dispute in host state's courts. The host state laws are perceived to be very weak compared to Western concepts of procedural and due process.[154] She explains further that the local judges are not competent enough to handle technical and specialist cases therefore choosing a different law to the host state will safeguard the parties' economic interests. Thus, the developing countries should prepare to surrender some of the historic arguments of sovereignty to attract transnational corporations to invest and develop their countries and to adopt a choice of law

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[152] Pedro Roffe, Reflection on Current Attempts to Revise International Legal Structures: The North-South Dialogue-Clash of Values and concepts, contradictions and compromises, 9 Georgia Journal of international and & Comparative Law (1979) at 556.

[153] ibid.

[154] Mary Kathryn Lynch, Conflict of Laws in Arbitration Agreements between Developed and Developing Countries, Ga. J. Int'l & Comp. L. 669 (1981) at 670.

clause that is just and fair for all the parties. Nevertheless, party autonomy to select the applicable law is recognised by international conventions. For example, Article 3.1 of the Rome Convention provides that:

> …a contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.[155]

Similarly, Article 1, 301 of the US Commercial code states that:

> …an agreement by parties to an international transaction that any or all of their rights and obligation are to be determined by the law of this state or another state or country is effective, whether or not the transaction bears a relation to the state or country designated.[156]

Section 187 of US Restatement (Second) of Conflict of Laws provides that:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue…[157]

Section 188 of Restatement of the law Second Conflict also states that:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue,

[155] Article 3.1 of the Rome Convention 1980 (80/934/EEC).

[156] Article 1, 301 of the U. S. Uniform Commercial code 1952.

[157] Restatement (Second) of Conflicts of Laws 187 (1971).

has the most significant relationship to the transaction and the parties under the principles stated in s6

(2) In the absence of an effective choice of law by the parties, the contracts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:
(a) the place of contracting.
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
These contracts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and place of performance are in the same state, the local law of this state will usually be applied…

It is observed that the different provisions above provide guidelines which established that the parties' choice of law should be honoured. Section 188 above also indicates that the law of the state with the most significant relationship to the matter will govern that matter where a choice has not been made. An academic writer posits that, the terms and obligations of the parties under the agreement may not be stated clearly, occasionally, the terms may need to be interpreted in accordance with the applicable law,[158] therefore, choice of law clauses cannot be overlooked in international commercial activities. It is also observed from the majority of concluded oil and gas agreements that the host state local laws were the applicable laws that governed the agreements. Al-Emadi posits further that one of the reasons behind the intention to choose the domestic law to govern contractual obligations and rights is the fact that the host states are familiar with their laws compared to other laws.[159]Jazrawi and Zalewska added that applicable law is the key issue of dispute between parties to the petroleum agreement because it determines whether the place where the disputes occurred is decisive of the law to be

[158] Talal A.Q Al-Emadi, Stabilisation clauses in international joint venture agreements, International Energy Law Review, 2010 at page 58.

[159] ibid.

applied.[160] Qatar's exploration agreement (Joint Venture) can be cited as an example to illustrate this point, the contract contained a choice of law clause and it states that: *"the laws of the state of Qatar shall apply to the rights and obligations of parties under this agreement and to the construction and interpretation hereof"*.[161]

4.3 The English courts' approach to determining the applicable law in the absence of a choice of law.

The court approach depends on the time and year when the agreement was signed, and this will be examined in turn. Firstly, and as briefly mentioned above, if an agreement was entered before 1st of April 1991 the right approach would be by common law. The English common law approach to settle the disputes in the absence of choice of law was established in ***P & O Steam Navigation Co v Shand***[162] where the court agreed that, it was necessary to consider by what general law the parties had wished their agreement to be governed. The parties to the agreement in this case had failed to use express words and the court concluded that their intention could be inferred in accordance with the terms and nature of the agreement. The court considered if there had been an implied choice. Similarly, in ***Compagnie d'ArmenentMartime SA v Compagnie Tunisie de Navigation SA***,[163] the court was required to determine the governing law of the parties' agreement. In this case, the agreement was negotiated in France (Paris) between French shipowner and Tunisian Company for the shipment of oil from Tunisia port and the agreement indicated that "this contract shall be governed by the laws of the flag of the vessel carrying the goods". It is pertinent to point out that the clause failed to stipulate the name of the vessel and no flag was nominated. However, the clause clearly provided for

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[160] Wessen Jazrawi and Agnes Zalewska, UK: mastering applicable law in English proceedings- Deutvhe Bahn v Masercard, Golbal Competition Litigation Review 2017 at page R-41.

[161] Article 17.1 of Qatargas Joint Venture.

[162] *P & O Steam Navigation Co v Shand* (1865) 3 Moo PCNS 272.

[163] *Compagnie d'Armenent Martime SA v Compagnie tunisie de navigation* SA [1971] AC572.

arbitration in London. The matter before the court was to determine whether the clause which provided for arbitration in London carried an inference that the intended law was an English Law or purporting to specify proper law capable of application where it was observed that no flag and no vessel is specified in the contract. Lord Wilberforce concluded that an arbitration clause "must be treated as an indication, to be considered together with the rest of the contract and relevant surrounding facts".[164] The decision means that the presence of arbitration clause in an agreement is not the only determinant, other surrounding facts will be considered. Therefore, dicta from this case emphasised why parities must pay attention to governing law clause. It further illustrates that parties' intention to refer disputes to arbitration in certain country may mean the parties have indicated that the applicable law is to be the law of that country as seen in this case.

Accordingly, parties to the oil and gas agreement should specify the applicable law because failure to specify the proper law may have huge impact when disputes arise. The case of ***Tzortis v Monark Line AB***[165] can be cited to buttress this point. This case involved the sale of a ship and the contract was signed in Sweden and was to be performed there. The buyer however was a Greek and the seller was a Swedish while the contract provided for arbitration in London. Meanwhile, the arbitration clause in this agreement was the only connection with England. The Court of Appeal found that English law was the governing law of the agreement, despite the absence of provision in the underlined agreement and there was no connection with England except the arbitration clause. The decision which emanated from this case further emphasised that the court were willing to draw an inference as long as a choice of law is left for the court

[164] *Compagnie d'Armenent Martime SA* (n 163) at page 59.

[165] *Tzortis v Monark Line AB* [1968] 1 WLR 406.

to be determined. Bowen L.J in ***Jacobs v Credit Lyonnais*** explained that this approach was appropriate so that the court can apply what he described as;

"sound idea of business, convenience and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties".[166]

However, Haynes opposed this approach, especially where it applies to international banking contracts. He posits that*:*

> …in so far as international banking contracts are concerned, it will be difficult to find an implied choice since many of the factors, such as language, terminology and currency, which might otherwise indicate an implied choice, are commonly used to comply standard market practices which have developed over many years, and not because of any preferences by the parties.[167]

It is further established that the English court would adopt the above factor as a last result, after other means such as express and implied choices to determine the governing law have been exhausted. Morris added that only in case of absence of choice, whether implied or expressed, have the English courts determined the law of contract by selecting the law that, with reference to certain transaction, had the closet and most real connection.[168] Other factors to be considered by the court include the choice of forum, the language to be used in the agreement, the currency and finally, the place where the contract will be carried out. [169] It is observed that the courts can apply three tests to determine the parties' choice of law in the absence of choice, but it is never a requirement for the court to apply these tests accordingly. The English court can decide to apply any relevant test as deemed fit. For example, the case of ***ArmadoraOccdental SA v***

[166]*Jacobs v Credit Lyonnais* (1884) 12 QBD 589 at 601.

[167] Haynes A, *The Law Relating to International Banking* (Bloomsbury Professional Ltd) page 17.

[168] David McClean Morris, *The Conflict of Laws* (London, Sweet & Maxwell Ltd).

[169] ibid.

Horace Mann Insurance Co[170] can be cited as an example. This case involved a US company which part insured a claimant's fleet of vessels under a contract of insurance which was negotiated and issued in the United State of America and provided for insurance premium and claims to be paid in America under dollar policies. Nevertheless, the remaining cover in relation to the fleet were insured by different insurers situated in London including Lloyds but there was a clause in the contract which stated, "Follow London" It means other insurers were expected to follow Lloyd's underwriters or other Insurers located in London in respect of settlement of claims, amount, terms and conditions in every issue concerning the insurance. In addition, there was another clause which stipulated that New York City in America should be chosen, and all other related disputes should be determined in accordance with US Law in the US Court. This contract provision was disregarded by the claimant who initiated an action against the defendant in London, demanding for compensation for damages and losses under the agreement. But the defendant alleged that the English Court had no jurisdiction because the contract stipulated that American law was to govern the contract and therefore, the contract was not governed by English Law neither by its terms nor by any implication. The court however ruled that inference can be drawn from the clause which indicated "Follow London". The court emphasised that the clause was of paramount importance and indicated that the agreement was to be construed, interpreted and applied in accordance with English Law. The Court further argued that the suable clause had not been followed instead the claimant had opted for the "Follow London" clause to issue a writ. Similarly, in non-oil and gas related case ***Sulamerica Cia De Seguros SA V EnesaEngenharia SA***,[171] the court was required to establish the governing law of an arbitration agreement within construction policies. It was made clear within the policies that the contract was subject to law of Brazil and jurisdiction but there was

[170]*Armadora Occdental SA v Horace Mann Insurance Co* [1977] 1 WLR 520.

[171]Sulamerica Cia De Seguros SA V Enesa Engenharia SA [2012] EWCA Civ 638.

arbitration clause within the same agreement which selected London as the seat of arbitration. The court applied three tests to determine the applicable law; the express choice, the implied choice, and the closet and most real connection. The court found that arbitration clause is legally different from the governing law of the agreement but confirmed that the law of the seat in London should be applied. It was pointed out that the agreement indicated Brazilian Law as governing law of the agreement and at the same time satisfied the implied choice part of the test. However, the court argued that the parties must have known that by choosing another country as the seat of arbitration they have inevitably accepted that the arbitration law of England will apply. In addition, the court found that under the arbitration law of Brazil, the consent of defendant, Enesa, in this case would be required otherwise arbitration agreement would not be enforced. The court concluded that the parties would not have anticipated that, and it would undermine the purpose of arbitration agreement. Thus, English law was the governing law because the arbitration clause in the agreement had its closet and most real connection with London which the Court believed would ensure fair and just out come for the parties. The decision which emanated from this case added some clarity to a situation where an agreement contains conflicting law and arbitration clauses. It is therefore essential for the parties to state in the agreement which set of laws they wish for the contract to be governed as this would enable the court to establish which law should be relied on to interpret their obligations.

4.3.1 <u>The Recast Rome I Approach (Regulation (EC) NO 593/2008)</u>

Rome I covers similar grounds as the Rome Convention in its recast form, it changes the existing presumption into a fixed rule and the fundamental rules were kept but they can only be applied to contracts signed on or after 17 December 2009. Article 3 expects the court to check whether an implied choice of law can be found in the absence of an express choice. It affirms that “a contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or part only of their contract".[172] It is observed that Article 3 (1) agrees with English Common law approach by adopting a restrictive approach to ascertain an implied choice as established in common law cases discussed above. In addition, in the absence of choice of law, the place where the party that is supposed to perform the obligations of the agreement lives would apply.

The provisions under Article 4 of Rome I cannot be overlooked. It splits the contracts into eight categories and laid determinative factors to designate the applicable law. Article 4 (1) (a) deals with contracts for the sale of goods, Article 4 (1) (b) for contracts for the provision of services, Article 4 (1) (c) provides for franchise contracts and Article 4 (1) (c) addresses distribution contracts. These categories are governed by the law of the country where the service provider, franchise, seller or distributor has his habitual residence. Other contracts not mentioned in the above categories are governed by the law of the country where the party expected to effect the characteristic performance of the contract has his habitual residence.[173]

It is noted that the above approach slightly differs from the earlier Rome Convention, which provided that contract must be governed by the law of the country "with which it is mostly connected"[174] subject to presumptions regarding "characteristic performance".[175] However, if the characteristic performance could not be found, or the agreement was confirmed to be more closely connected with another country, then presumption could be rebutted in favour of that country. It is obvious from Rome I provisions that the presumption of the Rome Convention

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[172] Article 3 (1) OF THE Rome I Convention.

[173] Article 4 (2) Rome I.

[174] Article 4 (1) Rome Convention.

[175] Article 4 (2) Rome Convention.

in respect of characteristic performance was changed into two rules concerning the applicable law. It has prompted the academic writers to express their concerns. For example, Hart and Charles pointed out that the harmonisation of applicable law rules within the European Union cannot prevent intra-EU forum selection from impacting on the decision of disputes.[176] The justification for this argument is that, procedural and evidential issues are guided by the law of the forum and such rules are not the same between member states unless efforts is made to harmonise that too. It is further argued that the court tend to favour local law when it is required to rule whether national law or foreign law applies.[177] Thus, a party trying to rely on particular law as governing law will be better off to bring an action in that state due to some practical and commercial considerations, such as language differences, enforcements of the award, geographical convenience and familiarity of the parties with chosen forum. Consequently, it could be suggested that applicable law in an exploration agreement should be subject to local law of the host state in which exploration activities are taking place due to the sensitive nature of some of the petroleum agreements. For example, a Production Sharing Agreement in Nigeria is recognised and governed by a Nigerian Act of Parliament, regardless of terms and conditions of exploration agreement. Some of Nigeria's laws cannot be overruled by terms of agreement and the provision of local content in Nigeria. PSA is subject to Nigeria local law; the royalty and taxation are also subject to domestic law. Issues surrounding taxation have been identified as major obstacles in Nigeria arbitration as highlighted above. Courts in Nigeria have relied on a number of principles to overturn arbitration award in tax related disputes and it is established that oil and gas disputes are not subject to arbitration. Temple, has given his support for host state law to be the applicable law of oil and gas agreement. He posits that natural resources

[176] Philippa Charles and Hart Daniel, The Evolution of Rome, New Law Journal, 160 NLJ 61 2010 at 62.

[177] ibid.

agreement will almost always be subject to the appropriate host-state domestic law.[178] In view of these points, transnational corporations must understand what the local law of host state provides in relation to exploration activities, they should look closely at the relevant provisions because some of them may not be overridden by petroleum agreement, they will still apply.

4.4 Conclusions

It has been established in this chapter that both parties to exploration agreements have key roles to play in ensuring that their behaviour does not have a long-term effect on contractual relationships, particularly their set goals. The host state in one hand aspired to promote the economic growth of the state and to achieve that; they must have petroleum agreement that can meet the needs of the state and those of its citizens. The transnational corporations on the other hand had the intention of maximising their profits and to achieve the set goals. They must protect terms and conditions of exploration agreements so that their investment can be as profitable, predictable and stable as anticipated and they wanted to be assured of certainty and efficacy. It has been noted that the exploration agreements created rights and obligations for the parties which they must fulfil as expected. In order to identify the causes of imbalance in oil and gas agreements, the chapter began with a discussion on the long-term contractual relationship of the parties and shed some lights on potential risks in international oil and gas agreement that are likely to affect parties’ ability to fulfil their contractual obligations. The chapter pointed out the various ways in which political risk can occur and if it occurred as a result of state’s measure such as expropriation then the consequences may hinder the fulfilment of contractual obligations and put transnational corporations in most difficult position as illustrated with references to the cases of Ecuador, Venezuela and Kazakhstan. It has been observed in this chapter that host state measures such as expropriation can be mitigated by

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[178] Richard M Temple, African natural resources agreements: Stabilisation tricks and traps for the unwary, African Journal of International and Comparative Law (2017) at 588.

having a stabilisation clause in the oil and gas agreement to ensure the economic balance of the contracts and creates a stable business environment. In addition, the chapter posited that political risk can be internal and external struggles such as civil war, strikes, terrorism, vandalism, oil theft, sabotage, kidnapping, attacks and oil supply disruption. Some of the incidents referred to here have prompted negative reaction from transnational corporations in the past and the evidence revealed that oil fields were shut-down, and force majeure were declared on numerous occasions. The chapter suggested that cases of vandalism, oil theft and supply disruption can be managed by involving local people in control of the oil sector and by assuring them that the host state has not overlooked their interest in oil and gas contracts. The local people support will help to minimise associated political risks even the transnational corporations may as well maximise their out-put. Additionally, natural and technical risks were critically examined, and it was noted that technical risks can lead to cost overruns and adversely affect out-put of oil and gas operations. However, the host state and transnational corporations can manage all potential risks by inserting a number of clauses in oil and gas contracts, such measure would enable the parties to share future risks among themselves. It was noted that certain risks are beyond the control of parties to oil and gas agreement and it may be difficult to prevent unexpected natural disaster or an Act of God therefore relevant contractual clauses must be considered. Force majeure clauses are largely adopted by majority of oil-rich countries to mitigate the effect of unforeseen circumstances. The chapter briefly touched other measures that can be taken to reduce the non-commercial risk by transferring certain risk to a third party that was not involved in underlined agreements such as Multilateral Investment Guarantee Agency, a member of the World Bank Group (MIGA). Though, this may offer little help if the risk concerned is related to political changes.

The binding nature of some of the special clauses in international oil and gas are critically analysed. It is noted that parties to oil and gas agreement may make use of standard clauses like stabilisation clause, renegotiation clause, force majeure clause, arbitration clause and applicable law clause to minimise the risks of an unanticipated circumstances which are likely to affect the fulfilment of parties' obligations. As noted in the chapter that if the host state willingly agreed and inserted stabilisation clause in the petroleum agreement, then the host state has accepted to be bound by the terms of the agreement not to unilaterally make sudden changes in the law that would breach its obligations under the agreement. However, renegotiation clauses play a different role, it does not freeze the law, but the aim is to keep the relationship moving and alive by ensuring the parties strike the right balance when it is obvious that circumstances have changed and that changes can be justified. Therefore, a renegotiation clause can be relied upon to invite the other party to negotiate to resolve the problems. However, the chapter pointed out that renegotiation clause must not be used to the detriment of the transnational corporations.

Arbitration clauses cannot be excluded even if the parties carefully drafted the petroleum agreement. The chapter pointed out that an arbitration clause ensures parties' interests are protected. The host state prefers the disputes to be settled according to the domestic law, in their local courts so that they can get fair judgement from local tribunals. Transnational corporations may not feel comfortable for disputes arising from their exploration activities to be settled by the law of that state. Nevertheless, it is recommended by the provisions of ICSID that investment disputes should be referred to arbitration. The majority of host states have opted for arbitration for settlement of disputes including Nigeria even though tax related disputes are not arbitrable in Nigeria as seen in decided cases evaluated in this chapter. Only commercial transactions disputes are subject to arbitrations despite the provisions under Arbitration and Conciliation Act 2004.

CHAPTER 5

A CRITICAL ANALYSIS OF INTERNATIONAL ENVIRONMENTAL LAWS AND THEIR APPLICATION BY HOST STATES

5.1 Introduction

This chapter examines international environmental laws which have been developed to safeguard the environment in relation to oil and gas exploration activities. Environmental problems are not limited to air pollution. It includes oil and gas spillage, chemical accidents and hazardous materials, gas flaring, global warming and acid rains, just to name a few. It is noted that, some of these identified problems were present because of human activities and can be managed if not completely eradicated. International organisations including the United Nations have attempted to minimise the causes and put them under control by coming up with several international agreements to tackle environmental challenges. Some of the agreements were formulated to deal with natural resources and emphases were on territorial waters, fishing rights and navigations. Some focus on nuclear issues which are beyond the scope of this research. This chapter however investigates the major principles of international environmental laws and their application at a national level.

Part of the chapter also examines the principles of international environmental law and analyses UNCLOS III, the United Nations Law of the Sea 1982, which is regarded as the most effective international agreement. It is pertinent to point out that some Articles of the UNCLOS III have been thoroughly examined in Chapter 2 of this research.[1] However, the relevant environmental provisions under UNCLOS III will be discussed here because this convention defines rights and obligations of member states in relation to the Oceans, gives guide-lines and covers

[1] UNCLOS III is discussed in Chapter 2 at 2.4.6 p, 103 to 109.

international business activities. Article 159 provides for state's responsibilities in respect of individual activities which are likely to cause environmental problems while Article 153 stipulates that if a member state fails to live up to expectation then that state will be held responsible for breach of its expected international obligations under UNCLOS III. In addition, Annex III, Article 4 and paragraph 4 takes care of exploration and the host state's responsibilities.

The Precautionary Principle is one of the principles which means assuming action prior to activities being implemented and before its outcome is discovered.[2] The majority of international agreements recognised and applied this principle and it was criticised by some academic writers. One argues that precautionary principle puts undue restrictions on life and creates problems[3] but supporters of the principle believe that precautionary principle can work if applied correctly. The principle of prevention is also considered in this chapter and there are mixed comments on this as will be discussed. However, it is highly respected for its potential to address the environmental problems.

The Polluter Pays Principle in the Rio Declaration of 1992 is another relevant one; it entails the responsibilities of the host state and shed some lights on the rights and obligations of the host state concerning transnational corporations' exploration and exploitation activities.

This chapter answers the question: to what extent have the principles of international environmental law been utilised at a state level and whether developing countries have been able to overcome the pressures from transnational corporations on the issue of environmental law? It further looks at how the principles have helped the oil-rich countries in Africa to create

[2] De Sadeleer, Environmental Principles, from political slogans to legal rules, 2002 at page 91.

[3] R Artfield, the precautionary principles and Moral Value in Timothy O'Riordan and James Cameron 1 edition, (1994) at 159.

their own environmental laws to minimise environmental problems associated with exploration activities. Nigeria particularly has enacted several environmental laws in accordance with the provisions of United Nations Conventions upon which premise it could be argued that the Conventions have helped to some extent countries in Africa to invest on environmental developments.[4]

In addition, the chapter further discusses internal and external challenges faced by the host state, particularly, the implementation of principles of international environmental law. A lack of public awareness and lack of governmental initiative are regarded as the key factors which made environmental laws ineffective. Academic writers' views on this point are critically analysed. Some believe that host state's involvement in certain types of oil contracts, specifically, joint ventures have hindered the implementation of domestic legislation on environmental issues. Consequently, the role of action groups and their efforts to obtain justice for the victims of environmental disaster in Niger Delta area in Nigeria are examined. The relevant case laws are considered and the case of ***Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria***[5]has been critically analysed. This case revealed some unknown shortcomings of the transnational corporations in Delta Nigeria where the oilfields were contaminated after exploration activities with serious environmental degradation and negative health consequences for the local people. With the support of external organisations, the court ruled against Nigeria and concluded that the Africa Charter on Human and People's Rights had been engaged. The enforcement of environmental law will be

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[4] Nigeria for example has created several laws regulating environmental issues. Oil Navigable Waters Act 1968 and Oil Pipelines Act 1956 are most significant pieces of law on environmental problems. One of their provisions deals with pollution resulting from oil and gas exploration activities.

[5]*Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria, Communication* No 155/96.

considered as an important principle of justice and responsibility of the host state. The host state must ensure victims of environmental problems are compensated.

The chapter further sheds some light on enforcement for the local people and considers whether the victims of the Delta region in Nigeria could have obtained a fair judgement they deserved if liability for pollution is regulated by global treaty. The representatives' locus standi is identified as one of the problems. It is observed from one of the cases dealt with in this chapter that a claim for compensation for pollution was delayed for 14 years and there was no explanation for the unnecessary procrastination. Nevertheless, it is concluded that environmental problems created by human activities require joint efforts from developed and developing countries, at every level both local and international to minimise, since there is limit to what can be done to prevent natural disasters.

5.2 The identification of international laws and principles

Historically, much legislation and a range of principles exist to phase out environmental problems in the world with provisions for the improvement of air quality and reducing environmental degradation. In spite of this, cases of environmental pollution and gas flaring continue unabated in Nigeria. It is argued that environmental problems can be linked to oil and gas operations, from exploration and extraction via processing and distribution to transportation, consumption and disposal of natural resources used in oil production.[6] It is also observed that despite the emergence of environmental liability legislation, and a number of cases connected to oil pollution, the victims of oil pollution are in some cases left without any remedy.[7] Prior to 1900 there were few international agreements to deal with environmental issues and the existing ones were created to protect national sovereignty over natural resources.

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[6] Raphael J Heffron, A treatise for energy law, Journal of world Energy Law and Business (2018) 11 (1) at 44.

[7] Amnesty International, " Another Bodo Oil Spill: Another Flawed Oil Spill Investigation in the Niger Delta " 9 2012) Available at <http://www.amnesty.cz/zakazdoucenu/doc/Nigeria-Another-Bodo-oil-Spill.pdf> accessed 3 October 2018.

Some focused on territorial waters, fishing rights and navigations but left environment problems unsettled. However, things began to change from 1950 to 1972 because at that time ecological problems were being noticed and addressed. Many environmental laws were passed, some regulating nuclear issue from civilian use and sea pollution from oil. Those laws created liability for oil pollution and oil control particularly in North Sea area. The Stockholm Conference was held in 1972 by the United Nations and further environmental laws were made, principles of environmental law also emerged from international treaties, customs and agreements. These treaties include; the Antarctic Treaty 1961, the Great Lakes Treaty 1954, the Kyoto Protocol 1973, the Polar Bear Treaty 1973, the Outer Space Treaties of 1967 and 2011, and the Treaty banning nuclear weapon testing in the atmosphere under water and outer space 1963. In addition, we also have the Rio declaration on Environment and Development 1992, the United Nations Convention on Biological Diversity 1992, International Convention for the prevention of pollution of the sea by oil 1954, International Convention for the Prevention of Pollution from Ships 1973 (MARPOL) and its Protocol, London Dumping Convention 1972, London Protocol, United Nations Framework Convention on Climate Change 1992, International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties 1969, High Seas Conservation Convention 1958, International Convention on Civil Liability for oil Pollution Damage 1969 and above all, 1982 witnessed the birth of UNCLOS III[8] which formed the basis for the existing international environmental law.

Some international environmental principles were briefly mentioned in the introduction of this chapter. However, it is pertinent to assert that the Precautionary Principle was introduced by international treaties to protect the environment and human health from pollutants. It also came

[8] United Nations Convention on the Law of the Sea (10 December 1982) 1833 UNTS.

to be in recognition of the urgent need to protect the environment and the people from being exposed to harmful substances. The 'Polluter Pays' Principle is another popular one which was created to ensure that whoever caused damage to the environment should be held accountable for the cost of that damage. Omukoro affirmed that legal systems around the world have identified the principle that whoever causes foreseeable harm to others should be held accountable for the damage resulting from their omissions or actions.[9] It is noted that this principle was incorporated into European Treaty, treaty of Rome. Subsequently, the 'Prevention Principle' was also made to tackle environmental problems. This principle requires that state make law to reduce the risk of transboundary harm and it has been applied in majority of international agreements as evaluated below.

5.3 A Critical Evaluation of Environmental Laws

UNCLOS III

UNCLOS III is an international agreement which emerged after the third United Nations Conference on the Law of the Sea 1982. It provides for a comprehensive legal mechanism on tacking environmental challenges and facilitates the protection of the environment through the general environmental protection principles and principle of state responsibilities. Under its provisions, states are required to have measures which can control, prevent and reduce pollution of the marine environment and ensue jurisdiction's activities are carried out in a manner that will not cause damage by pollution to the environment of other states.[10] Part I, Article 1 (1) (4) of UNLOS III defines pollution as follows:

> Pollution of the marine environment" means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious

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[9] Dickson E Omukoro, Environmental regulations in Nigeria and liability for oil-pollution damage: musings from Norway and the US (Alaska), International Energy Law Review. 2017 at 324.

[10] David Hughes Environmental Law third edition (1996) at page 82.

> effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[11]

Furthermore, Articles 192, 193,194,197,199,206,208 and 235 deals with States' general obligation. Article 192 provides that: "States have the obligation to protect and preserve the marine environment. "Article 193 says that: "States have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment." Article 194 addresses measures to be implemented by the states to reduce and control pollution:

> 1- States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavour to harmonise their policies in this connection.
> 2- States shall take measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other state and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign right in accordance with this convention.

In view of the above provisions under UNCLOS III, States are required to put in place measures to safeguard marine environment otherwise they may be breaking international law and be liable according to provisions under Section 9 of UNCLOS III. Article 235 provides that;

> 1- States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment. They shall be liable in accordance with international law.
> *2*- States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

[11] Ariticle 1 (1) (4) of UNCLOS III.

Academic writers have expressed concern regarding the lack of provisions for liability for pollution and clean-up cost under UNCLOS III.[12] It is argued that the Convention has failed to deal with a series of vital issues relating to the exploration. In addition, it is further criticised that there were no environmental conditions under which operations should be carried out and the liability that should follow in case of accidents caused by exploration and exploitation activities or technical failures.[13] However, offshore productions are contributing to the economic growth and development of petrol around the world but there is no global treaty to address a situation where offshore petroleum development results in accidental pollution. Cases of offshore petroleum pollution around the world can be cited to buttress this point. Pollution assessment was carried out in the Gulf of Guinea and the result revealed that exploration activities in Nigeria had contributed to heavy pollution of the area. Similarly, there was oil leakage from a pipeline (Cameroon-Chad) operated by COTCO, Cameroon's national oil company which resulted in heavy pollution in Cameroon. The US BP Gulf of Mexico spill and petroleum disasters that occurred in 2010 as well as Montara Australia blowout of the 80-metre-deep well in waters of the Timor Sea in 2009 are other major examples of offshore petroleum pollution with no international agreement dealing with such occurrences. This problem cannot be resolved if individual states are encouraged to regulate petroleum development to cover their jurisdictions as provided for under UNCLOS III. Evidence have shown that offshore petroleum pollution transcends national boundaries therefore, collective effort is needed to find a lasting solution. Efforts have been made in the past to adopt an international convention to control offshore petroleum development, but the move was opposed. There was a negotiation in 1977 for civil liability for oil pollution damage arising

[12] Marianthi Pappa, Exploration of energy resources in the deep seabed: opportunities for industry, challenges for law, International Energy Law Review, (2018) at 71.

[13] ibid.

from exploration for and exploitation of seabed mineral resource but it failed to receive four signatories needed for ratification to come into force.[14] Similarly, it is claimed that states were not interested in subsequent Convention on Offshore Mobile Craft, 1994 and Canada Draft known as thedraft convention on offshore units, artificial islands and related structures used in the exploration for an exploitation of petroleum and seabed mineral resources.It is argued that such conventions could have made significant contributions to the coordination of international maritime law because the objective was to foster the universal application of international law to reduce the vulnerability of developing countries in negotiation for oil and gas development arrangements with transnational corporations.[15] It was advanced further that the conventions contained some special provisions likely to close the gap in global regulation of offshore oil and gas development and in particular, cleaning up liability and costs.[16]

In relation to this challenge**,** the London Convention on Marine Dumping also emerged as a result of a United Nations conference on the Human Environment held in Stockholm 1972. The London Convention is one of the first international conventions to control dumping and pollution of the sea from human activities and came into force on 30 August 1975. It addresses the disposal of waste deliberately at sea, it also covers aircraft, vessels and oil platforms. Article of 1 the convention provides that:

> Contracting Parties shall individually and collectively promote the effective control of all sources of pollution of the marine environment, and pledge themselves especially to take all practicable steps to prevent the pollution of the sea by the dumping of waste and other matter that is liable

[14] Robin R Churchill, facilitating (Transnational) Civil Liability Litigation for Environmental Damages by Means of Treaties: Progress, Problems and Prospects, (2001) 12:1 YB Intl Envtl L, 3 22-24.

[15] Richard Shaw, THE fpso- Is it a ship? The proposal CMI offshore mobile Craft Convention- an update (2000) AMPLA YB81.

[16] Richard Shaw (n 16).

to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.[17]

Article III (i) (a) (ii) says:

(a) "Dumping" means:

(i) any deliberate disposal at sea of wastes or other matter from vessels, aircraft, platforms or other man-made structure at sea;

(ii) any deliberate disposal at sea of vessels, aircraft, platforms or other man-made structure at sea.[18]

The Convention makes unlawful the dumping of waste and pollutants that can pose risks and hazards to marine life, living resources and human health. It is established that the purpose of the London Convention is to control all sources of marine pollution of the sea through regulation of dumping into the sea of waste material. It is pertinent to point out the significant of the word "deliberate" because the convention emphasised that deliberate dumping is prohibited. Parities which deliberately dump objectionable materials must be held liable for any damage arise as a result of intentionally dumping. However, dumping of certain material requires an authorisation from designated and appropriate authority under strict control and certain conditions must be met. Thus, materials or substances can be dumped once a permit is granted. This signals improvement over the previous provisions and earlier conventions. This convention applies to all vessels and it provides the list of prohibited and restricted materials. It introduced the use of a licensing system because of the ocean's ability to handle some of waste material and made a recommendation for strict evaluation of the environmental impact of the dumping before damage occurred. In addition, in 1996 the parties to the London Convention renegotiated a restrictive approach to move from the permissive dumping approach under London Convention and thus the London Protocol was created. The conventions have to some extent helped the parties to stop unregulated dumping and incineration activities at

[17]Article 1 london Convention 1975.

[18] Article III (i) (a) (ii) of London Convention 1975.

sea.[19] Therefore, most dumping is now subject to permit and dumping prohibitions have been extended to include dumping of radioactive and industrial waste.[20] However, there is no provision for pipeline discharges from land, offshore installation and operational discharge from vessels within the scope of London Convention and subsequent London Protocol. In other words, the agreements failed to regulate the disposal of waste arising from offshore activities such as release of toxic substances during exploration and exploitation processes. It was clearly stated under London Convention that dumping does not include:

> The disposal at sea of waste or other matter incidental to, or derived from normal operations of vessels, aircraft, platforms or other man-made structures at sea and their equipment, other than wastes or other matter transported by or to vessels, aircraft, platforms or other man-made structures at sea, operating for the purpose of disposal of such matter or derived from the treatment of such wastes or other matter on such vessels, aircraft, platform or structures;[21]

> The disposal of wastes or other matter directly arising from or related to the exploration and associated off-shore processing of sea-bed mineral resources will not be covered by the provisions of this convention.[22]

In view of the above provisions, it could be summited that neither the London Protocol nor London Convention regulates offshore pollution arising from exploration activities. Similarly, The International Maritime Organisation (IMO) adopted another convention known as the International Convention for the Prevention of pollution from ships (MARPOL) amended by Protocols. It is argued that this Convention has seen significant decrease in pollution and it has contributed greatly to the control of environmental problems arising from international

[19] Article 5 of London Protocol.

[20] Article 4,5 of London Protocol.

[21] Article III (b) (i) of London Dumping Convention.

[22] Article III (C) OF London Convention.

shipping.[23] However, it was criticised for focusing only on pollution of the marine environment from the shipping industry but created an impression that offshore exploration activities were covered within the MARPOL. For example, the ship was defined, and it identified offshore installations such as floating platforms, fixed and floating craft but later excluded harmful substances arising from petroleum offshore exploration activities as detailed below.

Article 2 (4) sates that:

> …ship" means a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms.

Article 2 (3) (b) (ii) provides that:

> (b) "Discharge" does not include:
>
> (ii) Release of harmful substances directly arising from the exploration, exploitation and associated offshore processing of sea-bed mineral resources.[24]

Moreover, an attempt was made to create uniform rules and procedure for assessing liability and compensation for oil pollution damage across the globe the Civil Liability Convention (CLC) and 1992 Fund Conventions were created. The objectives of these conventions were to have measures to compensate the victims of oil pollution damage at sea. They imposed strict liability on the oil-tankers owners for pollution damage irrespective of fault except for force majeure circumstances. However, CLC and Fund Conventions like previous conventions discussed failed to provide for upstream offshore installations and the insurance scheme does not cover offshore pollution clean-up liability as well as the compensation of offshore oil and

[23] The report was published by International Maritime Organisation and Available at <http://www.imo,org/en/OurWork/Environment/PollutionPrevention/Pages/Default.aspx> accessed 28 April2018.

[24] Article 2 (3) (b) (ii) of International Convention for the Prevention of Pollution from Ships 1973.

gas development. It is clear from it provisions and under definition of ship in Article I (I) that offshore petroleum pollution is exempted from the list.

> …Ship means any-seagoing vessel and seabome craft of any type whatsoever constructed or adapted for the carriage of oil bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying bulk as cargo and during voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk aboard.

Fixed offshore oil and gas structures are missing from the definition which only included floating storage units. Therefore, this convention also failed to address the environmental problems arising out of oil explorations. Equally, the International Convention on Oil Pollution Preparedness, Response and Co-operation 1990 was adopted after the 1989 disaster of Exxon Valdez off the Alaskan coast where oil tanker released gallons of crude oil into the sea. It was reported that Exxon Valdez had dumped 11 million US gallons (41.8m litres) of crude oil and contaminated around 1,300 miles 2,080 km of coastline.[25] The IMO Assembly realised that it was necessary to adopt an international convention on oil pollution preparedness and response to urgently deal with serious threat to the sea by oil pollution involving ships. The Convention provides for parties to prepare oil pollution emergency plan[26] and to present the report of oil discharge without delay to sea ports and coastal authority.[27] The coastal authority is required under the provision to carry out the necessary assessment of the incidents and to inform other

[25] The report was published by the BBC on this day 1950- 2005 available at <http://news.bbc.co.uk/onthisday/hi/dates/stories/march/24/newsid_4231000/4231971.stm> accessed 29 April 2018.

[26] Art 3 of International Convention on Oil Pollution Preparedness, Response and Co-operation, 1990.

[27] International Convention on Oil Pollution Preparedness (n 27) Art 4.

state parties of action needed to deal with incidents,[28]which must include training, technical assistance, information system, research and development on incidents involving oil spill and pollution.[29] However, it is argued that the Convention only mitigates part of offshore oil and gas pollution as far as the title indicates. The provision focuses on mitigating loss and damage arising out of oil pollution through preparedness and prompt response and on how to prevent pollution by encouraging rescue.[30]Ayamdoo added that the Convention covers accidental parts of offshore oil and gas pollution but failed to regulate forms of pollution occurrences such as environmental disturbances, seismic surveying which determines the location and size of oil and gas reservoirs and decommissioning where there is no apparent discharge of oil.[31] Consequently, it is observed that this convention does not provide for environmental problems resulting from oil and gas exploration activities but successfully addressed the incidents of oil pollution involving ships. It is therefore pertinent to examine other relevant principles and customary international law to establish how they have been used to control oil and gas associated environmental problems.

5.4 <u>Customary International Law</u>

Historically, customary international law was established in the twentieth century and was defined in the Statute of the International Court of Justice as "evidence of a general practice accepted as law".[32] It can be determined in two ways. Firstly, by general practice of states as observed from the definition and secondly by what the states have known and accepted as law.

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[28] ibid Article 5.

[29] ibid Article 8.

[30] Ashok Mahapatra, International Convention on oil Pollution Preparedness, Response and Cooperation- An overview, (International Oil Spill Conference Proceedings, vol 1995, Long Beach, California, February-March 1995) at 775.

[31] Nelson Atanga Ayamdoo, Protecting the Gulf of Guinea in an oil boom: regulating offshore petroleum pollution in a divided world, the Journal of world Energy Law and Business, (2016) 9 (3): 219 at page 229.

[32] Article 38 (1) (b) of the Statute of the international court of justice.

Customary international law provides that state should not encourage activities within their territory or control to cause harm to other states. Lingjie suggests that emergence of this principle can be linked to the Trail Smelter Arbitration which asserts that:

> No state has the right to use or permit the use of its territory in such a manner as to cause injury in or territory of another or of the properties or persons there in, when the case is serious consequence and the injury is established by clear and convincing evidence.[33]

It is observed from Schrijver's comment that the rights of states under the principle of Permanent Sovereignty Over Natural Resources in international law are bound since they imply certain duties such as a duty to ensure every indigenous and ethnic people benefit from the exploration and exploitation of natural resources and the resulting national development. In addition, a duty to ensure a due care is given to environment, which includes the customary obligation not to cause harm to the area and to ensure natural resources are utilised for sustainable production and consumption.[34] The ***Corfu Channel case*** can be cited to buttress this point where Albania deliberately placed mines within its water and eventually caused damage to two naval vessels of the UK's navy. The international Court of Justice analysed the territorial situation of the North Corfu channel which connected two high seas together. Evidence showed that the water had been regularly used for international navigation, the court then ruled that the water should be perceived as belonging to international highways whereby an innocent passage would not be required to seek approval and cannot be prevented in time of peace by the coastal state. The court held that Albania was responsible for the explosion resulting from the mines which caused damages and loss of life in the British naval vessels under international law. The fact that the UK had breached the sovereignty of Albania's

[33] Lingjie Kong, Environmental Impact assessment under UNCLOS III, Chinese Journal of International Law, Volume 10, issue 3, (2011) page 651.

[34] N. Schrijver, *Permanent Sovereignty over natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997 page 390.

exclusive territorial waters did not justify Albania's action. This case therefore establishes that each state has a duty "not to allow knowingly its territory to be used for acts contrary to the rights of other states"[35] The North Corfu Chanel principle affirms the one which emanated from the Trail Smelter arbitration discussed earlier. Similarly, Arbitration in the case of **Lac Lanoux**[36]where the Arbitral Tribunal is required to settle a water course dispute between France and Spain cannot be overlooked. France began a development process to divert water to generate hydroelectric energy with a promise not to alter the volume of water flowing to Carol River, but the Spanish Government believed that the proposed works would affect its interests and alleged that France's plan would breach its water exclusive rights under a number of treaties entered into in 1886. Spain further claimed that it was unlawful under the treaty to undertake such work without the mutual agreement of both countries. The Arbitral Tribunal concluded that, there was no foreseeable injury to Spain and reaffirmed that every state has a duty, when exercising its right, to respect and consider the rights of another state. In addition, the Tribunal explained in respect of 1886 treaties that the French government did not violate any of the treaties' provisions. Besides, the provision under the treaties did not constitute a genuine reason to override the general rule considered as a rule of customary international law.

5.5 The Precautionary Principle

Historically, the precautionary principle has been around since the early days of civilisation with some customs and tradition of indigenous community having the perception of precaution embedded in them.[37] However, the modern Precautionary Principle was first introduced in the 1970s in German's Vosorgeprinzip clean air legislation, in an effort to minimise damage to the

[35] UK v Albania, 1949, ICJ Rep. 4 at 22.

[36]*Lake Lanoux Arbitration (Spain v France)* 24 Int'l L. Rep. 101 (1957).

[37] P.H. Martin, If you don't know how to fix it please stop breaking it! The Precautionary Principle and Climate Change, 2 (2) Foundations of Science (1997) at 263.

environment from smog acid rain.[38] It was defined in layman's word as better safe than sorry.[39] The principle also means assume action before an activity is implemented and before its results are identified. [40] The Principle has been applied in numerous international agreements. For example, Principle 15 of the Rio Declaration 1992 on Environment and Development provides that:

> In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. [41]

In the view of the above provision under the Rio Declaration, Nliam posits that the precautionary principle is relevant to oil and gas exploration and production.[42] He argues further that the principle put transnational corporations on the high alert for contingent environment risk in relation to exploration activities because environment impact may not have been foreseen at the beginning of upstream oil and gas development.[43]Therefore, the principle increases the chance of successful operations and helps to put in place technologies to deal with unforeseen environmental risks. In addition, references were made to its application in numerous international agreements, treaties, conventions, international environmental

[38] J. Cameron, Interpreting the Precautionary principle (1994) at page 35.

[39] J. Peterson, Sustainable Development, Sustainable Decisions and the precautionary Principle, 42 Natural Hazards at page 517.

[40] De Sadeleer, Environmental Principles, From political slogans to Legal Rules 2002 page 91

[41] Rio Declaration on Environment and Development, 31 ILM 874 (1992).

[42] Sylvester Oscar Nliam, International oil and gas environmental legal framework and the precautionary principle: the implications for the Niger Delta, African Journal of International and Comparative Law, (2014) at 28.

[43] Sylvester Oscar Nliam (n 43).

instruments and EU policies. For example, the London Ministerial Declaration 1987, the North Sea Ministerial Conferences in 1984 and European Union Policy in relation to the environment where Article 191 of the Lisbon Treaty asserts that:

> Union policy on the environment shall aim at high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.[44]

It is noted that the above provision recognised the importance of the precautionary principle for an improved environmental protection and it could be submitted that the objective of the principle is to encourage prevention of harm to the human health and environment. It is pertinent to explain the legal nature of the conventions examined in this section. The Stockholm Declaration was not accepted as a treaty and is not legally binding. However, most of its principles contained certain considerations to be taken into account in resolving identified environmental problems. Despite its non-binding character, the Declaration is significant legally. It stimulated collective action globally, as it encouraged cooperation and planning necessary for the needs of developing countries. Similarly, the Rio Declaration was not adopted as legally binding agreement, but it was accepted as a statement of customary international law and contained fundamental principles for the achievement of sustainable development. In addition, its principles had great impact at the international level because majority of the international convention relating to multilateral cooperation included environmental protection as one of the aims and objectives of the state parties. In addition, the Basel Convention on the Control of Transboundary Movement of Hazardous waste and their Disposal 1989 was known with non-binding character. Still, one of its most significant contributions over the years is the

[44] TFEU Article 191 (2).

elaboration of number of policy instrument within the framework of the convention. Numerous national and regional capacity building and training projects have been implemented.[45]

Furthermore, the United Nation Framework Convention on Climate Change 1992 (UNFCCC) is known with non-binding character. However, it sets the parameters for global discourse and provides an essential forum for dialogue and decision making on climate change matters. It forms basis of the climate change regime and urges action to ensure human safety and the stabilisation of greenhouse gas concentrations which prevents dangerous interference with climate change. It is established that Kyoto protocol emerged as a result of UNFCCC and sets out legally binding emission reduction obligations for developed country parties. Additionally, the Convention for the Protection of the Marine Environment of the North-East Atlantic, 1992 emerged at the time when it was necessary for further international action to prevent and eliminate pollution of the sea and marine environment. It was not binding like other agreements discussed early but nevertheless, it addressed all sources of pollution of the marine and adverse effects of human activities upon it. The convention stressed importance of precautionary principle and encouraged regional cooperation in dealing with marine areas which have been adversely affected. However, applying this to the offshore petroleum pollution, it has not been established whether the application of the principle is sufficient and effective at preventing the causes of environmental degradation from oil and gas exploration activities. Therefore, it is pertinent to examine some special burdens which the principles impose on the users of ocean in general. Sadeleer asserts that the principle held a presumption in support of human health and environment and as a result creates burden of proof on whoever engages in any activity that can threaten the environment and human health.[46]Weintraub added that users of the ocean

[45] A number of regional treaties incorporating these principles have been formulated by group of countries around the world to complement the global regime of the Basel Convention.
[46]De Sadeleer, Environmental Principles, from political slogans to Legal Rules, (2002) at 203.

are required to take extra caution, to undertake appropriate research and develop non-polluting technologies, and to avoid activities that can pose risk to the ocean.[47] The policy makers are also required to be more alert to likely risks of environmental pollution. No wonder, it was suggested by Freestone that the greater the possible harm to the environment, the more rigorous the requirement of alertness, effort and precaution.[48] Another commentator, Hey, asserts that the principle has a dynamic element which requires all users of the sea to develop non-burdensome and non-polluting technologies.[49] She argues further that burden of proof continues as far as precautionary principle is concerned and concluded that “when scientific information is in doubt, the party that wishes to develop a new project or change the existing system has the burden of demonstrating that the proposed changes will not produce unacceptable adverse impacts on existing resources and species”[50]A supporter of the principle justifies why the principle receive tremendous support by affirming that firstly; it aims at avoiding harm to the environment as well as human beings and secondly, it has the tendency to maintain natural ecosystem without which less well-off populations would be worse off.[51] However, the arguments and views of the critics of this principle are also examined in the next lines.

It is argued that the interpretation of the precautionary principles is untenable and creates problems. This was supported by an academic writer, Sustein, who posits that, one can question

[47] Bernard A Weintraub, “Science, International Environmental Regulation, and the Precautionary Principle: Setting Standards and Defining Terms, (1992) 1 N.Y.U Envt’l LJ at 173.

[48] David Freestone, *The Precautionary Principle in International Law and Global Climate Change*, (Robin Churchill and David Freestone (eds.) (1991) at page 31.

[49] Ellen Hey, The Precautionary Concept in Environmental Policy and Law; Institutionalising Caution. 1992 4 Geo International Environmental Law Review.

[50] Ellen Hey (n 50).

[51] R Artfield, The Precautionary Principle and Moral Value in T. O’Riordan and J.Cameron eds at page 159.

whether the principle can be classed as absolute, an absolute adherence to the extent that the principle will prohibit every activity that can cause harm and if that is the case, it will be ineffectual and creates undue restrictions on life.[52]Sadeleer also believes that, the precautionary principle is a mere prescriptive and guiding principle which cannot bind.[53] While Artfield argues that the principle is basic and not overriding.[54] But the supporters of the principle disagreed and argue that it is not important whether the principle is prescriptive, basic, overriding or absolute, what is necessary is the principle's application. They affirm that some of the critics' arguments were unfounded. Besides, most of the claimed problems are not caused by the principle itself rather they are associated with misunderstanding of application.[55] He then suggested that the principle should be applied with extra caution and reasonable measure to avoid serious threat to the environment including human health. Consequently, and in view of both arguments, one can conclude that, the precautionary principle plays an important role considering the world-wide acceptance of the principle and its application by various international agreements, conventions and European policy; it also contained preventative measures to deal with contingent circumstances and uncertain risks.

5.6 The Principle of Prevention

It has been argued that the principle of prevention has the greatest potential to address the environmental problems. It was incorporated into a number of international conventions and mainly focuses on state's obligation not to engage in activities that can cause harm to the

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[52] Cass Sustein, Laws of Fear: Beyond the precautionary Principle (Cambridge University Press: New York 2005.

[53] De Sadeleer, Environmental Principles, from political slogans to Legal Rules, (2002) at page 178.

[54] R Artfield, the precautionary Principle and Moral Value in T. O'Riordan and J.Cameron eds at page 160.

[55] D B Resnik, the precautionary Principle and Medical Decision Making, Journal of Medicine and Philosophy (2004) 29 (3) at 281.

environment of other states. This is also known as duty of diligence in the sense that it makes it an obligation for the state to legislate and have policies to prevent harm and minimise the risks of transboundary harm.[56] Bullard added that the principle of prevention had been implemented when state makes environmental laws including national and EU law.[57] States are under an obligation to take necessary action to prevent environmental pollution before the damage occurs. He explains further that state must not wait until conclusive proof or causation is established[58] as indicated under Article 1 of Directive of the European Parliament that states have obligation to handle waste in a way that does not have a negative impact on human health and the environment.[59]

In the light of the foregoing, it is pertinent to evaluate related international agreements in the next paragraphs. It was provided under Principle 21 of the Stockholm Declaration that;

> States have, in accordance with the Charter of the United Nations and the principle of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[60]

It is observed that the above principle has become a popular customary law and it applies to all states and parties to the conventions. It is also noted from the principle 21 that the provisions emphasised state obligation on transboundary harm. Equally, Principle 2 of the Rio declaration

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[56] P Birnie and others, *international Law and environment* (Oxford University Press Oxford 2009) at page 148.

[57] RD Bullard, *Confronting Environmental Racism, Voices from the Grassroots* (South End Press Boston 1993) at page 204.

[58] ibid.

[59] Article 1, Directive of the European Parliament and of the Council on Waste Repealing Directive 2008/98/EC.

[60] Principle 21 of the Stockholm Declaration.

focuses on state responsibility but expanded the responsibility to cover "environmental development".[61]

Application of principle of precaution is found in Article 3 of the United Nation Framework Convention on Climate Change 1992 (UNFCCC) which states that:"The parties should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects".[62]

The provision under Article 2 (1) (a) of the Convention for the Protection of the Marine Environment of the North-East Atlantic (1992) cannot be overlooked. It provides that;

> The contracting parties shall, in accordance with the provisions of the Convention, take all possible steps to prevent and eliminate pollution and shall take the necessary measures to protect the maritime area against the adverse effects of human activities so as to safeguard human health and to conserve maritime ecosystem and, when practicable, restore marine areas which have been adversely affected.[63]

Similarly, The Basel Convention on the control of Trans boundary Movements of Hazardous wastes and their Disposal 1989requires that state take necessary steps to prevent pollution and to:

> Ensure that persons involved in the management of hazardous wastes or other waste within in take steps as are necessary to prevent pollution due to hazardous waste and other wastes arising from such management and, if such pollution occurs, to minimise the consequences thereof for human health and environments.[64]

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[61] Principle 2 of the Rio Declaration.

[62] Article 3 (3) United Nations Framework Convention on Climate Change 1992.

[63] Article 2 (1) (a) of the Convention for the Protection of the Marine Environment of the North-East Atlantic 1993.

[64] Article 4 (2) (c) of the Basel Convention on the control of Transboundary Movement of Hazardous wastes and their Disposal 1989.

The Basel Convention prohibits transportation of hazardous waste as a criminal and illegal act. However, enforcement was not covered by the provision, the parties are required to adopt protocol and rules to enforce liability for the transportation of hazardous waste in accordance with provision of Article 12.

> The parties shall co-operate with a view to adopting, as soon as practicable, a protocol setting out appropriate rules and procedures in the field of liability and compensation for damage resulting from trans boundary movement and disposal of hazardous waste and other waste. [65]

The Basel Convention was heavily criticised even though majority of developed countries ratified the convention. The United State of America has not incorporated the Basel Convention into its local law and it is argued that the US remains one of the largest generators of hazardous waste. To further support this argument, it is noted that hazardous waste in the US accounted for three quarters of total annual production.[66] In addition, one critic of the Convention posits that it lacks enforcement mechanism and fails to ensure that waste traders are held responsible for damage which occurs as a result of their trading activities. Thus, it has failed to attain environmental justice particularly in developing states.[67] The definition of "hazardous waste" under the Convention is regarded as uncertain and too broad because it was left to the parties to give interpretation and this can be capitalised on to avoid liability. For example, a party could argue that the exports (hazardous waste) are products and not hazardous. Above all, the rejection of a total ban on the international movement of hazardous waste was not in the best interest of developing countries because they advocated for a total ban not limited ban and

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[65] ibid Article 12.

[66] M. Bradford, the United States, China and Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal, (2011) 8 (2) Fordham Environmental Law Journal 1-47.

[67] Kenneth I. Ajibo, Transboundary hazardous wastes and environmental justice: Implications for economically developing countries, Environmental Law Review, (2016) ELR 18 4 (267) at.

developed countries supported a limited ban and argued that adoption of total ban would be economically disadvantageous.[68]

Furthermore, the provision of Convention on Biological Diversity (1992) is also relevant here as it encourages parties to embark on an environmental assessment before signing a contract which may have adverse impact on biological diversity. Biological Diversity definition is found in United Nations Earth Summit 1992 as follows; "Biological Diversity" means the variability among living organisms from all sources including, iter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and ecosystem." In addition, the International Court of Justice pointed out the importance of environmental impact assessment in ***Pulp Mills on the River Uruguay***.[69] This case involved Argentina and Uruguay concerning breach of an obligation under the Statute of the River Uruguay, a treaty between the two countries mentioned. Argentina alleged that Uruguay had unilaterally authorised a construction of two pulp mills on the River Uruguay without following the consultation and notification procedures within the treaty. Argentina further argued that the construction on the river posed a significant threat to the environment, quality of the river waters and was likely to cause transboundary damage. The court found that Uruguay had violated the treaty for failure to inform the Administrative Commission of the River Uruguay known as (CARU) of proposed plan of work before embarking on environmental authorisation of the pulp Mills and for not communicating the plans to Argentina through CARU. The Court reaffirmed that the environmental Impact assessment is:

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[68] A Andrews, Beyond the ban, can the Basel Convention Adequately safeguard the Interests of the World's poor in the International Trade of Hazardous Waste, (2009) 5 Law Environment and Development Journal at 167.

[69] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgement, ICJ Reports 2010.

> …A requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed activity may have a significant adverse impact in a trans boundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such work. [70]

With respect to the allegation that the construction had caused transboundary damage to Argentina or would have an adverse impact on the quality of waters, the court relied on the parties' arguments and concluded that there was no conclusive evidence to indicate that Uruguay has failed to act with due diligence, therefore there was no breach of substantive obligations under the Treaty.

Furthermore, states can use their resources as they like but they should ensure their activities do not violate the rights of other states in accordance with the provision of Draft Articles on the Prevention of Trans Boundary Harm from Hazardous Activities. The International Law Commission adopted the draft in 2001. The draft addressed state responsibility and provided some principles to be complied with including the Principle of Prevention. For example, Article 3 of the Draft states that "The State of origin shall take all appropriate measures to prevent significant transboundary harm or at any event to minimise the risk thereof"[71] In addition, the International Court of Justice reaffirmed in the ***Chozou Factory's case***[72] that it is a fundamental rule of international law that efforts should be made for reparation for any wrong a state has done including breaking the international law. This case involved Germany and Poland and is related to violation of international agreement and the court is required to consider whether Poland had breached bipartite agreement. Germany agreed to handover the control of Silesia

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[70] Pulp Mills on the River Uruguay (n 70) at 204.

[71] Article 3 of Prevention of Transboundary Harm from Hazardous Activities 2001.

[72] *Factory at Chorzow (Germany v Poland)* 1928, P. C.I.J. (SER.A).

Upper area to Poland on condition that Poland would not damage German's property and Poland agreed. However, Poland breached the agreement and forfeited two of Germany's companies located at Upper Silesia area. The Court held that Poland had breached the international agreement between the two countries and therefore, liable to compensate Germany for the loss. Equally, it is an established principle of international law that a breach of an international agreement creates a duty to make reparation. The court however concluded that:

> …it is a principle of international law, and a general conception of the law that any violation of an agreement involves an obligation to make reparation. Reparation is the indispensable complement of a failure to apply convention, and there is no need for this to be mentioned in the convention.[73]

Consequently, this fact is recognised by European Union and it has reflected in the Treaty on the functioning of the European Union. It is pertinent to point out some of its relevant article to this research before discussing Polluter Pays Principle. Article 191 (2) indicates that:

> Union policy on the environment shall aim at high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter pays.[74]

It is observed that the above Article incorporates two elementary principles of sustainable development law, the principle of a sensible use of natural resources as well as the precautionary principle. Additionally, the article referred to other two important elements, the polluter pays principle and the principle of prevention. Frances on this point argues that Article

[73] ibid at 102.

[74] Article 191 (2), Treaty of the Functioning of European Union 1957.

191 TFEU formed the basis of European Union environmental law and laid down interpretative base for the European Court of Justice".[75]

5.7 The 'polluter pays' principle

The above mentioned principle was introduced by the Organisation for Economic Co-operation and Development ('OECD') as a recommendation on international economic aspect of Environmental law in 1972.[76] Initially, the principle began as a principle of economic thinking and its objective was to avoid economic distortions of the market, not to tackle environmental problems and it was not created for the sake of the environment.[77] The objective was to reduce the pollution to a certain degree accepted by governments and therefore limit it to partial internationalisation. He justifies his argument by referring to the text of the Recommendation which specifies that:

> …allocation of costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter Pays Principle". This principle means that the polluter should bear the expenses of carrying out the above-mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other worlds, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and / or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.[78]

Furthermore, the 'polluter pays' principle has been extended to cover the issues of liability. It was utilised as a principle of liability and rectification in accordance with the principle of delict

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[75] Frances Aldson, EU law and sustainability in focus: will the Lisbon Treaty lead to 'the sustainable development of Europe'? Environmental Law Management, (2011) 23 (5) ELM: 284 at 286.

[76] OECD, Environment and Economic Guiding Principles Concerning International Economic Aspects of Environmental Policies, 1972 Recommendation, C (72) 128.

[77] Ole W Pedersen, Environmental Principles and environmental justice, Environmental Law Review, (2010)26 at 39.

[78] OECD Recommendation, at A (a) 4.

and tort, in addition to being regarded as principle of cost allocation as argued above. For example, it was adopted by the council on OECD's recommendation concerning the Application of the polluter pays principle to accidental pollution.[79] The Recommendation 1989 provides under application of the Polluter-pays principle that:

> In matters of accidental pollution risks, the polluter-pays principle implies that the operator of a hazardous installation should bear the cost of reasonable measures to prevent and control accidental pollution from that installation which are introduced by public authorities in conformity with domestic law prior to the occurrence of an accident in order to protect human health or the environment.[80]

It is noted from OECD Recommendation 1989 that for the Recommendation to be more effective, the polluter is required to bear the cost of preventive measures of accidental pollution of hazardous installations. Public funds can therefore be used for a State's other needs. Environmental justice campaigners believe the above provision signalled a complete internalisation of costs related to polluting activities since governments have been empowered to legislate to tackle environmental problems. Additionally, the polluter pays principle has further appeared in various environmental laws, EU Directives and agreements as briefly mentioned above under Article 191 (2) of TFEU. In addition, this principle is globally reaffirmed in Principle 16 of the Rio Declaration which provides that:

> National authorities should endeavour to promote the internationalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[81]

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[79] Recommendation of the Council concerning the Application of the polluter pays principle to Accidental pollution, C (89) 88 7TH July 1989.

[80] ibid at appendix 4.

[81] Rio Declarations on Environment and Development 1992 ILM 874, PRINCIPLE 16.

It is observed that the polluter pays principle is introduced as a control and command approaches and was included in the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) 1992. This Convention provides that the cost of reduction measures and pollution control or prevention should be paid by the polluters. It is argued that this Principle's objective is to ensure the polluter is responsible directly or indirectly for the pollution costs and therefore, applies to the person, either legal or natural, in charge of the polluting activity.[82] It has also been argued that the 'polluter pays' principle has evolved to allocate the cost of pollution to potential polluters by the authorities of the state concerned to ensure polluters compensate the victims of pollution and to require that the polluters cover the clean-up cost and pay for emergency response.[83] However, it worth noting that the principle does not signify a civil liability even though it has developed into a principle of international environmental laws. Nevertheless, Bleeker posits that its interpretation can be found in both a broad sense and a strict sense. [84]He clarifies further that in the principle's strict sense, it requires that the polluter pays the cost of pollution control and prevention. While in the broad sense, it extends the polluters responsibility to cover other costs such as taxes, charges, compensation for the victims and clean-up costs.[85] Some scholars posit that the polluter pays principle possesses certain functions such as redistribution function, an economic integration, a curative and a preventive function.[86]

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[82] Lin Zhu, Is the polluter paying for vessels-source pollution? Journal of Business Law, 2015 at 349.

[83] ibid at 351.

[84] A Bleeker, Does the polluter pay? The Polluter-pays principle in the case law of the European Court of justice, (2009) 18 European Energy and Environmental Law Review 289 at 294.

[85] A Bleeker (n 85).

[86] N. De Sadeleer, Environmental Principles: from political slogans to Legal Rules (Oxford University Press, (2002) at page 37.

As analysed above, the polluter pays principle plays a crucial role and it has been regarded as cornerstone of environmental regulation and principle of liability.[87] The principle indicates that the cost of environmental pollution and the externalities shall be integrated and borne by the polluters. This is welcomed by environmental justice campaigners because the principle is seen as a response to the demand for effective equitable distribution of the burden and damages linked with polluting activities,particularly, the provision which makes it an obligation for the polluters to bear the costs of pollution prevention including social costs.[88]

As analysed above, the precautionary principle, like the preventive principle and polluter pays principle are three main principles of environmental laws. It is observed that the precautionary principle is closely linked with the principle of prevention which is regarded as a sort of golden rule and a beacon of environmental law.[89] It is further observed that the principle of prevention on the international level brought about the state obligation not to cause harm to the environment of other states as established in principle 2 of the Rio Declaration and the principle 21 of the Stockholm Declaration as well as decision of the Trail Smelter case which addressed the issue of states' obligation to prevent transboundary harm and invoked the polluter pays principle. It is noted that prior to this case, the polluter pays principle had never been used or applied in an international context. [90] Therefore, in national and international context, as well as European Union Law, it can be argued that numerous legislation and environmental laws

[87] Catherine Banet, Effectiveness in Climate Regulation: Simultaneous Application of a Carbon Tax an Emissions Trading Scheme to the Offshore Petroleum Sector in Norway. Carbon and Climate Law Review, (2017) CCLR 1: pp 25-38 at 27.

[88] Ole W. Pedersen, Environmental Principles and Environmental Justice, Environmental Law Review, (2010) 26 at 42.

[89] N de Sealer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press: Oxford, 2002) at 89.

[90] Ellis, Jaye, Has International Law Outgrown Trail Smelter? Bratspies, Rebecca and Miller, Russell ed, Transboundary Harm in International Law: Lesson from the Trail Smelter Arbitration (2010) at 133.

have implemented the principle of prevention. The EU Directive on wastes has been carefully considered in this chapter as well as TFEU which required state members to take precautionary measures to prevent harm to human health and the environment. Above all, it has been argued that legal mechanism such as principles of environmental laws have laid down certain rules that those who cause foreseeable and significant harm to the environment and to others should be held responsible for the damage resulting from their activities or omissions.[91]

5.8 The extent to which environmental principles have been used by the state

It is pertinent to discuss how the existences of principles and environmental laws have helped some of the host states to reduce environmental problems. This section focuses on how selected countries have shown their commitments and implemented their environmental obligations as required by international law for the running and preservation of their natural resources.

Nigeria

Nigeria signed the United Nations Framework on Climate Change (UNFCC) in 1992 and ratified it 1994.[92] This Convention was regarded as the first global agreement to address the problem of climate change arising out of greenhouse gases. Equally, Nigeria signed the Kyoto Protocol and ratified it 1998 but only became effective in 2005. In addition, there are several legal mechanisms contained in different Acts of Parliament regulating environmental problems and liability in Nigeria. However, this section discusses the most relevant pieces of law on oil because the sector has been regarded as the major cause of environmental pollution in Nigeria. Some of these legislations will be evaluated and references will be made to other relevant laws, where appropriate.

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[91] R V Percival, Liability for Environmental Harm and Emerging Global Environmental Law, Maryland Journal of International Law, (2010) 25, 37, at 38.

[92] The report of Nigeria been a party to this convention was published in the unfcc website and available at <https://www.ufcc.int/essential/background/convention/statusofratification/items/2631.php> accessed 21 August 2013.

As analysed below, Nigeria has enacted many laws to protect the environment and to improve the quality of air. Associated Gas Re-injection Act and Regulations 1979 makes gas flaring unlawful and stipulated that oil companies should end the practice by 1984, otherwise they would be liable for a fine if the activity continued beyond the deadline. However, the Act was amended in the same year and provided for an exemption for gas flaring in certain circumstances, but the Minister of Petroleum Resources' consent must be obtained. Similarly, the Associated Gas Re-injection Act of 2004 demands for detailed programme of oil companies' activities relating to gas in oilfields in Nigeria. The Act of 2004 has similar provision as previously mentioned Act which prohibits gas flaring. In addition, the Nigeria Management Act on Environmental Draft 2000 is another piece of legislation formulated to deal with gas flaring cases in Nigeria. The Act makes it unlawful for individuals and oil companies to flare gas while making it an obligation for the Minister of the Environment to ensure gas flaring is banned, even though, the Minister can use his discretion to permit gas flaring in certain circumstances.

The importance of the Oil Pipeline Act 1956 cannot be overemphasised because it addresses the issue of liability and compensation to be given to victims of oil pollutions. However, one critic has argued that this Act was created to protect the interests of oil companies from the unnecessary burdens that such legislation might impose on them.[93] It was clear from the text of the Act that it was created "to make provision for licences to be granted for the establishment and maintenance of pipelines incidental and supplementary to oilfields and oil mining and for

[93] Dickson E Omukoro, Environmental regulations in Nigeria and liability for oil-pollution damage: Musings from Norway and the US (Alaska), International Energy Law Review, (2017), 324 at 325.

the purposes ancillary to such pipelines".[94] Section 11 (5) of the Act addresses the issue of compensation and provides that:

> ...the holder of a licence shall pay compensation-
>
> (a) To any person whose land or interest in land (Whether or not it is land respect of which the licence has been granted) is injuriously affected by the exercise of the rights conferred by the licence, for any such injurious affection not otherwise made good; and
> (b) to any person suffering damage by reason of any neglected on the part of the holder or his agents, servant or workmen to protect, maintain or repair any work structure or thing executed under the licence, for any such damage not otherwise made good; and
> *(c)* to any person suffering damage (other than on account of his own default or on account of the malicious act of a third person) as a consequence of any breakage of or leakage from the pipeline or an ancillary installation, for any such damage not otherwise made good.

It is noted from the above provision that the oil company's interest is protected when the pipeline incident is related to an act of vandalism or sabotage. The law has made it clear that compensation would be payable to the victims, if the injuries occurred because of direct activity of the oil company, otherwise, the licensee would not be held liable. This provision shows a degree of unfairness towards innocent victims of pipeline sabotage, it means the victims of oil-spills resulting from an act of vandalism by the third party are not protected under the law. The Act makes no provision for innocent victims, rather it denies them the opportunity to benefit from the provision under the Act. It could, therefore, be argued that oil companies are exempted by law from paying compensation in the event of any oil-spill incident. Omukoro posits on this point that sabotage of oil pipeline which resulted in oil spill on water or land has the potential to leave several communities without the means to cater for themselves and with no remedy in law.[95]Eben added that this provision has been hijacked by most transnational corporations

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[94] Available in the recital of the Act.

[95] Dickson E Omukoro (n 94) 89 at 325.

operating in the Niger Delta region as an exit window through which victims affected by oil spills are neglected without compensation.[96] It is reported that land and water in the Delta region are widely contaminated by Oil spills, negatively affecting aquatic and terrestrial creatures.[97] The indigenous communities see incidents of pollution as a threat and violation of their fundamental rights in connection with the management and use of water, land and natural resources that they believe belong to them by way of usage and tradition. It is further reported that the Niger Delta region of Nigeria is rich in biological diversity and to be specific, marine life which is perceived as a source of sustenance for the communities.[98] Consequently, the grievances of innocent victims of sabotage which resulted in oil-spillage and pollution are not being carefully considered under the above provision and it could prove to be problematic if left unattended to, since these indigenous communities rely solely on their environment for their survival. While the legislation has, to a certain degree, protected the transnational corporations by providing that they could not be held liable for the wrongful and criminal act of a third party, there is no provision under the law to protect the victims of pipeline sabotage. The critic of the provision therefore posits that if anyone should be hurt owing to the actions of a third party, should that person be an innocent victim who stands to benefit nothing directly from the profits of oil exploration? [99] He further concluded that the primary motive behind the

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[96] Racheal Eben, A systemic appraisal of Nigeria's vessel-source compensation regimes for spill victims, Africa Journal of International and Comparative Law.

[97] F P Udoudoh, Oil Spillage and Management Problems in the Niger Delta, Nigeria, 2 Journal of Environmental Management and Safety (2011) 138 at 42.

[98] Okechukwu Ejims, The impact of Nigeria International Petroleum Contracts on Environmental an Human Rights of Indigenous Communities, Africa Journal of International and Comparative law, 21.3 (2013): 345-377 at 346.

[99] Ellis, Jaye (n 91) at 325.

Oil and Pipeline Act (1956) was the protection of transnational corporations' interest and that the interests of innocent victims were a secondary objective.[100]

It is observed that the Oil and Pipelines Act (1956) failed to safeguard the interests of innocent victims of oil pollution as a result of pipelines sabotage. It is argued that there are substantial numbers of indigenous people who may suffer damage without protection or remedy in court of law simply because their interests were not catered for by the Oil and Pipelines Act.[101] The government of Nigeria however, enacted Petroleum and Distribution (Anti Sabotage) Act 1975, in an attempt to reduce acts of vandalism and oil pipelines sabotage. This Act makes it unlawful for individual to deliberately sabotage petroleum pipeline. For example, S.1 of the Acts provides that:

> "(1) Any person who does any of the following things, that is to say
>
> (a) wilfully does anything with intent to obstruct or prevent the production or distribution of petroleum products in any part of Nigeria; or
> (b) wilfully does anything with intent to obstruct or prevent the procurement of petroleum products for distribution in any part of Nigeria; or
> (c) wilfully does anything in respect of any vehicle or any public highway with intent to obstruct or prevent the use of that vehicle or that public highway for the distribution of petroleum products,
> Shall if by doing that thing he, to significant extent, causes or contributes to any interruption in the production or distribution of petroleum products in any part of Nigeria, be guilty of the offence of sabotage under this Act".[102]

Section 2 of the Act provides that:

> …Any person who commits an offence of sabotage under section 1 of this Act, shall be liable on conviction to be sentenced either to death or to imprisonment for a term not exceeding 21 years.[103]

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[100] ibid.

[101] Ellis, Jaye (n 91) at 327.

[102] Section of Petroleum Production and Distribution (Anti-Sabotage) Act, 1975.

[103] ibid at Section 2

It is noted that the above provision addressed only the case of wilful damage of petroleum pipelines but failed to render any assistance for the innocent victims of environmental pollution arising therefrom. Adangor noted that those provisions are mere deterrent against wilful sabotage which enable transnational corporations to use sabotage as a defence to claims initiated by innocent victims who have suffered from oil spills.[104] Another commentator argues that the reason law makers have excluded the innocent victims of sabotage in the provision could be due to fears that indigenous communities in the Delta region can frustrate the process of petroleum development.[105] Amnesty International's report has revealed that transnational corporations have claimed and relied on sabotage prior to investigation to establish the cause of oil spills. This was the case with the leaking pipeline at Bodo which experts later concluded was owing to a corrosion failure.[106]Another commentator has added that, in the past, oil companies attempted to use the sabotage as a defence to shy away from their responsibilities when it was not right to do so.[107]

In view of these commentators' arguments, it could be suggested that there should be a provision within the law to protect the interests of innocent victims of pipeline sabotage, rather than excluding them in an outright fashion. They should be given a chance to participate in decision making on exploration related matters that may affect their interest as this may enable

[104] Z Adangor, "Petroleum Industry Bill 2012 and the Principle of Vicarious liability of oil Producing States and Local Government Councils for Sabotage of Petroleum Facilities: Resurrecting an Oil colonial policy in the Niger Delta Region of Nigeria, Journal of Law and Conflict Resolution (2016), 1 at 8.

[105] Okechukwu Ejims, the Impact of Nigerian International Petroleum Contracts on Environmental and Human Rights of Indigenous Communities, African Journal of International and Comparative Law, 21.3 (2013) 345-377 at 351.

[106] Amnesty International Memorandum, Oil Spill Investigations in the Niger Delta, (September 2012) at page 3. Available at <https://www.amnesty.org/download/Documents/16000/afr440422012en.pdf> accessed on 29 May 2018.

[107] J G Frynas, Legal Change in Africa, Evidence from oil-related litigation in Nigeria, Journal of African Law 121 (1999) at 128.

the community to benefit from the petroleum resources which is important for their survival. Another way to avoid tensions between the local community and oil companies operating in the region could be by putting in place pipelines monitoring mechanism inform to shut down the leakage of oil in the event of any sabotage or pipeline rupture. This practice ensures the best practice as required by law that exploration and exploitation of oil in Nigeria which should be carried out according to good oil-field practices".[108]

Another important piece of legislation that cannot be ignored is the Petroleum Drilling and Production Regulation 1969. It is a relevant piece of legislation enacted to regulate oil production and exploration activities in oil industry in Nigeria. It sets out obligations and rights of licenses as well as lessees and requires that exploration and exploitation activities are monitored and supervised. Initially, it was welcomed and accepted because of its provisions for protection of the land, water and promotion of a healthy environment. One of its strengths is the provision for process of abandonment of oil wells and the requirement that licensees should maintain accurate information and record keeping. However, it was criticised for the lack of a provision in the regulation to deal with cases of non-compliance. The provisions were perceived as ineffective because the law lacks enforcement mechanism, it cannot be enforced; it has no provisions for fines and penalties. Above all, it encourages lack of transparency by stipulating that detailed information given by licenses be kept confidential.

The Oil in Navigable Waters Act 1968 is another piece of legislation that established that the government of Nigeria is determined to minimise the incidences of sea pollution. The Act was enacted in order to implement the terms of the International Convention for the Prevention of Pollution of the Sea by Oil Acts of 1954 and 1962. Additionally, the Act was required to make provisions for prevention in the Nigeria's navigable waters. It is noted that the Act addresses

[108] Section 9 of the 1969 Petroleum Act, Cap, P10 LFN 2004.

oil pollution from oil refineries and pipelines which are regarded as one of the main sources of environmental pollution in the country.[109] Section 3 of the Act covers the incident of pollution resulting from exploration activities and gas operations in Nigeria. The Section provides that;

> (1) If any oil or mixture containing oil is discharged into waters to which this section applies from any vessel, or from any place on land, or from any apparatus used for transferring oil from por to any vessel (whether to or from a place on land or to or from another vessel), then subject to the provisions of this Act-
> (a) if the discharge is from a vessel, the owner or master of the vessel; or
> (b) if the discharge is from a place on land, the occupier of that place; or
> (c) if the discharge is from apparatus used for transferring oil from or to a vessel, the person in charge of the apparatus, is guilty of an offence under this section.[110]

It is argued that the above legislation is an instrument that may be relied upon to minimise the incidents of oil pollution and environmental problems.[111] However, the law was criticised because it shows an imbalance between environmental and economic considerations.[112] For instance, it is argued that the true intention of the law makers is to make any attempt or omission a criminal act which violates the legislation. There is no provision whatsoever within the Act for victims of oil spills, they cannot claim damages or seek compensation directly from the masters or the owners of the ship by bringing an action in court due to a number of defences available under section 4 of the Act. For example, provisions in Section 4 of the Act provide a defence for an offence charged under section 1 above. The polluter only needs to prove that the oil discharge was to prevent destruction to the cargo or ship or for the purpose of saving

[109] Dickson E Omukoro, Environmental regulations in Nigeria and liability for oil-pollution damage: musings from Norway and the US (Alaska), International Energy Law Review, (2017) at 327.

[110] S.3 of the Oil in Navigable Waters Act 1968.

[111] Dickson Omukoro, Environmental regulations in Nigeria and liability for oil-pollution damage: musing from Norway and the US (Alaska), International Energy Law Review, (2017) at page 5.

[112] ibid.

life and that the polluter has taken reasonable steps to contain the discharge and minimise its effect on the environment. Section 4 of the Act provides that:

> (1) Where a person is charged with an offence under section 1 of this Act, or is charged with an offence under section 3 of this Act as the owner or master of a vessel, it shall be a defence to prove that the oil or mixture in question was discharged for the purpose of securing the safety of any vessel, or of preventing damage to any vessel or cargo of saving life:
>
> Provided that a defence under this subsection shall not have effect if the court is satisfied that the discharge of the oil or mixture was not necessary for the purpose alleged in the defence or was not a reasonable step to take in the circumstances."[113]
>
> (2) Where a person is charged as mentioned in subsection (1) of this section, it shall also be a defence to prove
> (a) That the oil or mixture escaped in consequence of damage to the vessel, and that as soon as practicable after the damage occurred all reasonable steps were taken for preventing, or (if it could not be prevented) for stopping or reducing, the escape of oil or mixture; or
> (b) that the oil or mixture escaped by reason of leakage, that the leakage was not due to any want of reasonable care, and that as soon as practicable after the escape was discovered all reasonable steps were taken for stopping or reducing it."[114]
> (3) "Where a person is charged with an offence under section 3 of this Act as the occupier of a place on land, or as the person in charge of any apparatus, from which oil or a mixture containing oil is alleged to have escaped, it shall be a defence to prove that the escape of the oil or mixture was not due to any want reasonable care, and that as soon as practicable after the escape was discovered all reasonable steps were taken for stopping or reducing it."[115]
> (4) "Without prejudice to subsection (3) of this section, it shall be a defence for the occupier of a place on land, who is charged with an offence under the last preceding section, to prove that the discharge was caused by the act of a person who was in that place without the permission (express or implied) of the occupier".[116]

[113] Oil in Navigable Waters Act 1968, s 4(1).

[114] Oil in Navigable Waters Act (n 114) at s.4 (2) (a) and (b).

[115] ibid at S.4 (3).

[116] ibid at S.4(4).

From the provision above, one critic argued that human errors should not be used as pillars of defence.[117] He believes the leakage, escape and discharge of oil from vessels could be prevented by proper maintenance and if vessel operators fail to live up to their expectations, the position of the law should be clearly stated. The words 'reasonable' and 'practicable' should spell out certain standards and what type of the ship's damage that can lead to discharge of oil into the water. Any leakage of the oil into the water due to improper maintenance should not be encouraged and escape or leakage should never be allowed as a measure of self-defence. The effect of defences could be too costly for the victims of environmental damage from such lawful leakage. For instance, the rights of the indigenous fisherman whose fishing rights have been deprived by certain discharge might have no protection in law and on this point, Omukoro posits that Oil in Navigable Waters Act (1968) does not cover the interest of victims of environmental pollution and it might be difficult to hold a polluter liable because of the defences under the Act which could be pleaded by the polluters.[118] Nevertheless, having exceptions under the Act in relation to environmental issues is not peculiar to only Nigeria. What matters most is to have effective mechanism to monitor the permissible level of oil discharge. The United Kingdom for example has similar provisions under the Prevention of Oil Pollution Act 1971, a careful examination of which is necessary.

Section 6 of the Act provides that;

(1) "Where a person is charged, in respect of the escape of any oil or mixture containing oil, with an offence under section 2 or 3 of this Act
…
(b) as a person carrying on operations for the exploration of the sea-bed and subsoil or the exploitation of their natural resources; or

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[117] O G Ajayi, Towards the mitigation and possible amelioration of coastal pollution in Nigeria- A Review of Legal Act (Oil In Navigable Waters Act [Cap 337] LFN 1990 [1968 No. 34.], International journal of advanced scientific and technical research, Issue 4 volume 1, January-February 2014, ISSN 2249-9954 at page 600.

[118] Dickson Omukoro (n112) at 327.

(c) as the owner of a pipe-line,

It shall be a defence to prove that neither the escape nor any delay in discovering it was due to any want of reasonable care and that as soon as practicable after it was discovered all reasonable steps were taken for stopping or reducing it".[119]

(2)" Where a person is charged with an offence under section 2 of this Act in respect of the discharge of a mixture containing oil from a place on land, it shall also, subject to subsection (3) of this section, be a defence to prove-

(a) that the oil was contained in an effluent produced by operations for the refining of oil;

(b) that it was not reasonably practicable to dispose of the effluent otherwise than by discharging it into waters to which section applies; and

(c) that all reasonably practicable steps had been taken for eliminating oil from the effluent".[120]

(3) If it is proved that, at a time to which the charge relates, the surface of the waters into which the mixture was discharged from the place on land, or land adjacent to those waters, was fouled by oil, subsection (2) of this section shall not apply unless the court is satisfied that the fouling was not caused, or contributed to, by oil contained in any effluent discharged at or before that time from that place.[121]

It is noted from the above provisions that the UK has a robust system in place to ensure that the environment is protected. The Act provided for several defences as did Nigeria, but a critical study of the UK Act reveals that section 6 subsection 3 of the Act explained the circumstances where defences may not be relied upon and such vital provisions were omitted under the Nigerian Act. The effect of fouling in the sea from oil discharge is addressed under the UK Act unless the court is satisfied that the fouling was not caused by oil discharge. It is evident from incident of water pollution and oil spill around the world[122] that release of the oil

[119] S.6 (1) (b) and (c) of the Prevention of Oil Pollution Act 1971.

[120] ibid at S.6 (2) (a)(b) and (c).

[121] Prevention of Oil Pollution Act (n 120) at s 6(3).

[122] The environmental effects of Gulf of Mexico oil spill of 2010 cannot be overstated and is regarded as the largest marine oil spill in history. The spill affected so many people particularly the residents who depended on fishing and tourism as the fishing was suspended and waters were closed in fear of contamination. Additionally,

in the waters is considered a serious environmental problem. The effects have grown the public attention towards environmental justice because of the resultant damage, including the death of marine mammals and oiled seabirds. Besides, the UK Act makes it mandatory to report[123] a discharge of oil into water and failure to comply with the reporting requirements would make the operator liable for a fine or a summary conviction.[124] In addition, the UK judicial review proceedings allow public and environmental groups to take actions if there is proof that government decision on environmental issues are against the public interest, but they must show that they had a sufficient interest in the challenged matter.[125] Judicial review is relevant on environmental issues which are not political and it is a procedure by which the High Court can review an administrative action by a public body and secure a declaration or an order of the court against infringement of public law rights as discussed below in EX parte Greenpeace cases where it is established that the public interest factor outweighed the general principle application.

The liability for pollution resulting from exploration activities in Norway is also worthy of mention. It is governed by the Petroleum Act (1996) and based on a rule of strict liability with no consideration of any fault with the exception and a reduced liability in certain circumstances. For example, if the cause of pollution is an act of God, an act of war and any circumstances

there have been a number of pollution and oil spills which have made public aware that oil spills are not hypothetical situation, they are foreseeable. There were oil leakage and spills in different offshore locations around the world. For example, oil spill in Montara, Australia, leakage of cargo ship in New Zealand, leak in the UK North Sea (the Gannet Alpha platform) and (Elgin field), the largest oil leak in Nigeria at the Bonga oil field, oil spills in Russia at Siberian river basins in 2012 and leakage of oil in Brazil at Frade field in Rio de Janeiro just to mention a few.

[123] Prevention of Oil Pollution Act 1971 c. 60, s 11.

[124] Prevention of Oil Pollution Act (n124) s.11 subsection (3).

[125] Bettina Lange, Elizabeth Fisher and Elose Sootford, *Environmental Law: Text, Cases and Materials* (Oxford University Press (2013) at page 370.

beyond the control of the operators or the licensee. It is pertinent to look at some of the relevant chapters of the Norwegian Petroleum Act;

Chapter 7-1 of the Act defines pollution damage, facility and part of facility as follow;

> Pollution damage means damage or loss caused by pollution as a consequence of effluence or discharge of petroleum from facility, including a well, and costs of reasonable measures to avert or limit such damage or such loss, as well as damage or loss as a consequence of such measures. Damage or loss incurred by fishermen as a consequence of reduced possibilities for fishing is also included in pollution damage.
>
> Ships used for stationary drilling are regarded as facility. Ships used for storage of petroleum in conjunction with production facilities are regarded as part of the facility. The same applies to ships for transport of petroleum during the time when loading from the facility takes place.[126]

Furthermore, Section 7-3 of the Act addresses the liable party and the extent of liability. it provides that:

> The licensee is liable for pollution damage without regard to fault. The provisions relating to the liability of licensees apply correspondingly to an operator who is not a licensee when the Ministry has so decided in connection with the approval of operator status.
>
> …
>
> If it is demonstrated that an inevitable event of nature, act of war, exercise of public authority or a similar force majeure event has contributed to a considerable degree to the damage or its extent under circumstances which are beyond the control of the liable party, the liability may be reduced to the extent it is reasonable, with particular consideration to the scope of the activity, the situation of the party that has sustained damage and the opportunity for taking out insurance on both sides.[127]

[126] S.7-1 of Norwegian Petroleum Act 1996.

[127] Chapter 7-3 Petroleum Act 29 November 1996 No. 72 relating to petroleum activities (last translated into English Language on January 5th, 2018).

It is observed that the Norwegian Petroleum Act enforces strict liability for environmental pollution and damage on the licensee and operator. It is further noted that issues of liability arising out of exploration activities including compensation are adequately dealt with by the national law. This legislation was put in place to ensure offshore oil exploration activities are conducted in a manner that would safeguard the environment and health and wellbeing of its citizens. Section 7-3 above clearly stipulated that the licensee is liable for pollution damage irrespective of any fault. It is further noted from the Act that liability is directed to the licensee alone and excluded other participants in the exploration operations such as employees and suppliers.[128] The victims of pollution damage cannot claim damages from other participants. Amukoro added that Norway's liability regime is the same with its petroleum policy and that has contributed to its success story. He believes that the country has set the right standards that others could emulate.[129] It is thus affirmed that Norway has struck a right balance between protecting transnational corporations' interests and protecting the environment with its petroleum policy and liability regime compared to Nigeria's Oil in Water Navigable Act (1968) which sets out a light punishment for the pollution damage. Nigeria could follow Norway's good practice and make violation of its Oil in Navigable waters Act a punishable offence regardless of possible cause and reason for pollution and discharge of oil into its waters. In the light of this, it is pertinent to examine the current penalties for offences under Section 6 of the Nigerian Water in Navigable Act which provides that:

> A person guilty of an offence under section 1, 3 and 5 of this Act shall, on conviction by a High Court or a superior court or on summary conviction by any court of inferior jurisdiction, be liable to a fine: Provided that an offence shall not by virtue of this section be punishable on summary

[128] Section 7-4, chaneeling of Liability under Petroleum Act 29 November 1996 No. 72 relating to petroleum activities (last translated 5 January 2018).

[129] Dickson Omukoro (n112) at 329.

> conviction by a court having jurisdiction inferior to that of a High Court by a fine exceeding N2, 000.[130]

The monetary fine under section 6 of Oil in Navigable Waters Act is perceived by one critic as inadequate and this is said to have made the Act ineffective and 'a toothless bull dog'.[131] The N2000 is a small amount of money compared to the effect of discharging oil into the water. In addition, the purpose of penalty imposed by the government is to deter people from breaking the law of the land, therefore, the punishment should reflect the gravity to prevent people from breaking the law or committing the offence. The amount of fine under section 6 can be afforded by operators and they may continue to discharge oil believing that such act will accumulate more than the fine of N2000 into their wallet. Ajayi has expressed his concerns that the fine is too light, advising the government to replace it with a tougher sanction such as revocation or suspension of the licence, heavy fine and possibly imprisonment.[132] It is believed that such measures will deter people from deliberately discharging oil into Nigeria's navigable waters or causing environmental pollution. Nevertheless, the Act prohibits discharging of oil into waters, making it an offence and specifying that the master of the ship or the owner responsible for discharge would be guilty of an offence under section 1 and 3 of the Act.

Consequently, it is established that Nigeria has enacted a series of pieces of legislation in order to minimise the incidents of oil spillage, some of which have been analysed in this chapter and various weaknesses have been highlighted. These statutes are far from achieving their aims and objectives and thus, Nigeria's law makers should ensure the provisions of the statutes address environmental problems and meet international best standards. The Nigerian Government's

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[130] N2,000 is equivalent to five British pounds (£5.00) according to the central bank of Nigeria official rate. Available at <http://www.cbn.gov.ng/rates/exchratebycurrency.asp> accessed 6 August 2018.

[131] OG Ajayi (n 118) at 599.

[132] OG Ajayi (n 118) 602.

commitment at a national level to make the spillage of oil into its Navigable waters a punishable offence is also acknowledged, but the disturbing fact is existence of the highlighted loopholes in the laws which allowed the transnational corporations to manipulate the policy by paying small amount of fine (N2000) rather than embarking on environmentally sustainable projects. Subsequently, the Nigerian government enacted a law to address some of the highlighted weaknesses. Nigeria Management Act on Environmental Draft, 2000 (NEMACT) made it a criminal offence and liability for an individual and corporate to flare gases. The Act gives the Minister of the Environment the power to ban gas flaring and a discretionary power to allow it in certain circumstances. The Act further provides for harsh punishment and fines for breaking the law. Subsection (4) provides that:

> Any person who violates the provisions of Sub-section (2) or (3) of this section commits an offence and shall on conviction be liable to a fine not exceeding N500,000,000.00 (Five Hundred Million Naira)."[133]
>
> In addition to the fine under subsection (4) it further provides at subsection (5) that;
>
> … the Chairman, Managing Director and the Directors of the body corporate at the time the offence was committed shall be liable to imprisonment for a term not exceeding 10 years each.[134]

The government initiative on the NEMACT was welcomed as the right and strict legislation needed to address the environmental problems. Supporters of the 2000 draft argued that this type of law is unprecedented in Nigeria's history particularly for environmental protection because they believe international oil companies have been operating without obligation to

[133] Naira is the Nigerian currency used by the Federal republic. 1 US$ was equivalent to N120.00 at the time of the draft. Therefore, N500,000,000.00 would be approximately $4,160,000.00.

[134] Subsection (5) NEMACT.

ensure human health and environment are protected.[135] Ironically, NEMACT ended up as a mere draft and never became an Act of Parliament. While perpetrators are held liable for causing pollution damage in developed countries, there are identified challenges which impeded the implementation and enforcement of international environmental laws particularly in developing countries. The following paragraphs examine some of the obstacles encountered by these developing countries in implementing relevant laws.

5.9 Some of the challenges facing environmental principles and their implementation in developing countries

It is established from the previous section that some of the international environmental laws led to the creation of national laws to address the impact of environmental problems such as marine pollution, air quality, water and waste disposal. The countries around the world have signed up to several international conventions and many laws and policies have been created to fulfil their obligations under those Conventions. Nevertheless, there are challenges and obstacles in implementing some principles of international environmental laws in countries like Nigeria which include; corruption, the lack of governmental initiative, low education, lack of finance, poverty, poor administration coupled with other social, economic and political problems. Thomas Sterner posits that "many institutions in developing countries are multi-ethnic oriented which has led to nepotism and corruption hence making it difficult to implement environmental policy and the choice of policy instrument." [136] Mui also supports Sterne's view and argues that in an ethnically diverse society, corruption and bribery within environmental

[135] Okechukwu Ejims, The impact of Nigerian International Petroleum Contracts on Environmental and Human Rights of Indigenous Communities, African Journal of International and Comparative Law 21.3 (2013) at 356.

[136] Thomas. Sterner, Policy Instruments for Environmental and Natural Resources Management, Resources for the future (2003) at page 24.

agencies and judiciary systems are likely to weaken the effectiveness and success of environmental principles[137]. These factors will be evaluated in the following paragraphs.

5.9.1 The lack of Public awareness about environmental laws and policies

The starting point is transparency which is encouraged by Principle 10 of the Rio Declaration. It provides that people should be given access to relevant environmental information kept by the State. The public need to be well informed of government's plans and agenda on environmental issues as doing so would create public awareness. Rose, on this point, argues that "good environmental governance may be enhanced by the government transparency, provided in the form of freely available public access to information concerning environmental management"[138] Environmental information could be provided and made accessible to the public in different forms, for example, electronic, print or social media such as television, radio, the internet, journals and newspapers to name but a few. These offer an opportunity for the host state to create public awareness in its environmental laws and policies. For instance, social networks such as Instagram, Facebook and Twitter may be used to create awareness and carry the public along in the implementation of environmental legislations and policies. The government can also use the media to intensify its effort on public education by broadcasting environmental programmes in the native languages of host communities to overcome the language barrier. Media and social networks can play an important role to enhance public awareness and educate people about the likely effects of pipeline sabotage and vandalism. It is argued that in many countries, most people engaging in vandalism are not aware of any related

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[137] V Mui, Contracting in the Shadow of a corrupt Court, Journal of Institutional and theoretical economics, 155 (2) at 249.

[138] Gregory L Rose, Gaps in the implementation of environmental law at the National, Regional and Global level. Available at <http://www.unep.org/delc> access on 10 August 2018.

laws and would not consider them relevant even if they know about it.[139] It was reported by Shell that sabotage in Nigeria was the largest cause of spills for Shell, accounting for about 14,000 tonnes.[140] In addition to media and social networks, the government may also create educational programmes to enlighten the public on the environmental implications and consequences of sabotage of oil pipelines on the economic and the environment where they live. Similarly, environmental education could be made a mandatory subject to be studied in schools around the country at every level to educate youths who are the leaders of tomorrow.

Furthermore, the United Nations encourage governments of developing countries to improve the living standards of people believed to be living below the poverty line because doing so will enhance public awareness in relation to the environmental problems and may allow them to act as the protectors of the environment.[141] This idea was supported by Ekpeyong when he argued that illiteracy and poverty are the causes of environmental problems because he believes that uneducated and poor people are bothered with the issues relating to their daily survival than environmental degradation and the lack of awareness could lead to reckless environmental behaviour.[142] The United Nations in another conference stressed further that with an easy access to environmental information; the people have better understanding and knowledge of the impacts of their activities on the environment and are able to take part in decision making processes that affect the environment.[143] Consequently, the government in developing

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[139] Reported by NGO that was set up to protect ecosystems in rural areas of developing countries. Available at <.http://www.ecovitality.org/badlaw.htm> accessed on 10 August 2018.

[140] Shell Petroleum Development Company sustainability report. Available at <http://www.sustainabilityreport.shell.com/2009/servicespages/downloads/files/all_shell_sro9> accessed 10 August 2018.

[141] Available at <http://www.unescap.org/drpad/vc/orientation/legal/particip> accessed on 10 August 2018.

[142] Ekpeyong, Environmental awareness as a panacea for sustainable environment management in Africa.

[143] The United Nations conference on environment and development. The report is available at <ttp://www.un.org/documents/ga/conf15126-1annex.htm> accessed on 12 August 2018.

countries should be more transparent and invest more on educating people on environmental programmes as this may enhance public awareness and minimise incidents of pipeline sabotage and vandalism within the country.

The source of environmental challenges such as water contamination can also be from a neighbouring state. This as well may be controlled by effective communication and exchange of information between the affected regions. It is therefore pertinent to look at the regional arrangement and what provisions are available to overcome such challenges under International Conventions.

5.9.2 Regional Arrangements

Regional Arrangement is identified as one of the obstacles that is affecting the implementation of environmental laws because many states share regional waters and if there is contamination in one region, it is likely to cause harm to species and habitats of neighbouring countries. This is envisaged by the United Nations under the Convention on the Conservation of Migratory Species of Wild Animals (CMS). This Convention recognises the exchange of crucial information between regions and neighbouring states. It aims to conserve aquatic, migratory and terrestrial species. The treaty was established under the UN environmental programme which takes care of the conservation of habitats and wildlife on international scale.

The CMS provides for several obligations and encourages parties to protect Migratory Species while requiring further that the places where they are located should be preserved and any factors which can endanger them should be adequately controlled. This Convention is regarded as the main framework which advises member states to create regional or international agreements that can be tailored to the needs of each region. Many agreements have been formulated as a result the CMS, namely; the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas 1992 as amended in 2003 (ASCOBANS), the Africa Eurasian Waterbird Agreement (AEWA), the Agreement on the Conservation of Cetaceans of the Black Sea and Cetaceans Area (ACCOMAS), the Agreement on the Conservation of European Bats and the Agreement on the Conservation of Albatrosses.[144]

In the same vein, Latin Americans have adopted the Convention to Combat Desertification (UNCCD) which was established in 1994. This Convention has been regarded by the United Nations as the sole legally binding international agreement connecting environment and development to sustainable land management.[145] In addition, many agreements have also been adopted on biodiversity, hazardous waste and climate change under the Central American Integration System (SICA). This organ is also known as the institutional framework of Regional Integration in Central America with set goals such as establishing ecological order in the region and to have a concerted action towards the preservation of the environment just to name a few.[146] SICA has assisted the Central America Region in implementation of national environmental management as well as regional instruments.

Furthermore, the Pacific Island states have adopted a regional system which has helped them to implement international Convention, the Montreal Protocol on Substances that Deplete the Ozone Layer. This treaty was intended to guide and protect the ozone layer by getting rid of the production of substances believed to cause ozone depletion. The treaty received a huge ratification and was accepted by many countries including the European Union and for this reason it has been regarded as an exceptional international agreement.[147] Additionally, The

[144] Available at <https://www.cms.int/about/intro.htm> accessed 12 August 2018.

[145] Avaliable at< https://www.unccd.int/convention/about-convention> accessed 12 August 2018.

[146] Available at< http://www.sica.int/sica/propositions_en.aspx?IdEnt=401&IdmStyle=2 > accessed 14 August 2018.

[147] It published by the United Nations that Montreal Protocol has been ratified by 197 countries including the European Union which confirms that upon signature " In the light of Article 2.8 of the Protocol, the community wishes to state that its signature takes place on the assumption that all its member states will take the necessary steps to adhere to the Convention and to conclude the Protocol" . Available at

Protocol expects developing states to control the production, consumption, import and export of chlorofluorocarbons (HCFCs). The following countries are operating under the provision of Article 5 of the Montreal Protocol; the Federal State of Micronesia, Fiji, the kingdom of Tonga, Kiribati, Nauru, Palau, Papua New Guinea, the Republic of Marshal Islands, the Solomon Island, Tuvalu, Vanuatu and finally, Western Samoa. It is submitted that developing countries are entitled to a longer phase-out period compared to developed countries and the reason for this preferential treatment is to address the fact that they do not have easy access to alternative technologies, capital investment and know-how for complying with the control measures stipulated under the Montreal Protocol. However, both developed and developing countries have binding, period-targeted and measurable commitments. It is reported that developed countries have been cutting back their HCFCs[148] consumption and hoping to phase them out by 2020.[149]

Nevertheless, the implementation of the Montreal Protocol has benefited human health and is regarded as a huge success because the world would have been a different place without the provisions of the Montreal Protocol, there would have been a collapse of the ozone layer leading to a rise in ultraviolet (UV) radiation in every part of the world with debilitating effects on the production of crops and marine life ecosystem. [150] The UNEP report further revealed that the implementation of the Montreal Protocol, through the intensive action of the parties

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<https://trteaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-2-a&chapter=27&clang=en> accessed on 12 August 2018.

[148] Hydrochlorocarbons (HCFC) are known as gases used universally in air-conditioning, refrigeration and foam applications. They are more potent than carbon dioxide in terms of potential on global warming.

[149] The report is available under the United Nations Environment Programme at <http://www.unep.org/ozonnaction/who-we-are/about-montreal-protocol > accessed on 11 September 2018.

[150] Available at< http://www.unep.fr/ozonaction/information/mmcfiles/7738-e-TheMontrealProtocolandHumanHealth.pdf> accessed on 11 September 2018.

since 1987 has protected the health and wellbeing of millions of people around the world.[151] In addition, the relevance of the agreements considered under this section to the oil and gas industry cannot be overemphasised. These agreements were created to protect and preserve the environment and its observed that factors that are likely to endanger environment and human health should be adequately controlled. Thus, the host state which owned the hydrocarbon natural resources is under obligations to ensure that exploration activities are carried out with utmost priority given to environmental protection. The number of incidents and cases examined in this chapter has established that transnational corporations are responsible for some of the major environmental problems and disasters and some of the identified environmental problems occurred as a direct result of human activities such as oil and gas exploration and exploitation. Consequently, some of the agreements examined here were regarded as the legally binding and exceptional international agreements which connected environment and development to sustainable land management. For example, the Montreal Protocol encouraged the developing states to control the production, consumption, import and export of products that are likely to cause harm and damage to human health and environment.

5.9.3 Lack of Governmental Initiative

It is pertinent to select Nigeria for a better understanding of this element. The Federal Government of Nigeria (FGN) is the highest authority and controls the affairs of the nation. The power wielded by the FGN surpasses the power of state and local authorities under the Supremacy and Enforcement of Power Decree of 1970. The case of ***Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited***[152] can be cited to argue that the Nigerian government is not willing to enthrone environmental policies which may reduce the harm caused to the environment and human health from exploration activities and output of

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[151] UNEP Website (n 151).

[152] *Jonah Gbemre v Shell Petroleum Development Company Nigeria Limited* FHC/B/C5/53/05.

transnational oil corporations. In this case, the High Court Judge held that gas flaring violates the rights to life and dignity including the right to a clean pollution free and healthy environment and Shell was then ordered to stop gas flaring immediately in the plaintiff's community (Iwherekan). Ironically, the judge's decision to stop the gas flaring was perceived by the Federal Government as the one which could slow down economic growth particularly at a time the government was planning to increase oil production output in the country. The High Court judge was transferred as a result and replaced with a new judge by Federal Government without justification. The government capitalised on the provision under the above legislation and reinstated oil production. This decision to reinstate exploration activities establishes the lack of governmental initiative and commitment in curbing environmental problems arising out of exploration activities simply because the oil and gas sector is the country's major investment. In addition, a move to replace the judge in the above case indicates that the Nigerian government preferred economic growth over tackling environmental problems believing that environmental issues will slow or hinder economic growth. It is noted from the World Bank brief that 95% of Nigeria's earnings and 76% revenues are generated through oil industries.[153] This clearly shows that Nigerian government relies on the oil industry to generate the country's incomes and it is argued that, neither environmental law nor environmental programme has been able to address the priority placed on economic growth in majority of poor countries.[154] Pam Slater added that many developing countries follow similar development strategies which depend heavily on the use natural resources such as petroleum

[153] World Bank Nigeria; country brief available at <https://www.worldbank.org/en/country/nigeria/overview> accessed 13 September 2018.

[154] Violet Aigbokhaevbo, Environmental terrorism in the Niger delta: implications for Nigeria's developing economy, International Energy Law Review (2009) at 41.

exploration to the detriment of the environment.[155] It has also been argued that there is dependent relationship between the Federal Government of Nigeria and the transnational corporations and certain factors have been pointed out to justify the relationship. For example, Nigeria lacks the technology and equipment to embark on exploration activities on its own and therefore depends on oil companies' industries to do so and generate revenue. This may also cause the reluctance in regulating transnational corporations' activities in relation to environmental issue due to the fear that regulation may prevent or discourage foreign investors particularly in the oil industry. The inability to regulate against exploration activities and its environmental impacts has, in turn, become problematic for the big players in the oil and gas industry. For example, there have been conflicts due to the negative environmental impact in the Niger Delta region of the country and the local people have been kidnapping oil workers, sabotaging the pipelines and blowing up oilfields. An oil servicing vessel for Chevron was seized by militants and foreign oil workers were held hostage aboard the sea craft.[156] This type of attack and many more have greatly affected oil production in the country and an academic writer posits that environmental degradation, political marginalisation and cultural strangulation by the Federal Government of Nigeria and transitional corporations have unsettled the region.[157] His view is supported by Klaus Toepfer that "when people are denied access to clean water, soil and air to meet their basic needs, we see the rise of poverty, ill health and a sense of hopelessness. Desperate people can resort to desperate solutions. They may care

[155] Pam Slater, Environmental Law in Third World Countries: Can it Be Enforced By Other Countries, ILSA Journal of International & Comparative Law, Vol 5: (1999) at 519.

[156] The Cicero, From Snatching Toddlers to Oil Vessels, This Day Newspaper, 18/05/2008 at page 10.

[157] ibid, 146 above at 47.

little about themselves and the people they hurt".[158] In addition, the local people in Delta region had limited choice, they had to contend with environmental problems such as water, soil and air pollution and on this point Wale Ajal expressed his concerns and concludes that indigenous people living in these areas are isolated from their ecological environment. He believes that they are marginalised politically, economically and socially.[159] While there are many causes of the conflict, it is argued that the main cause is the government failure at all levels including discriminatory policies which exclude the local people from participating in making the rules that will enable them benefit from the oil wealth. [160] The Oil companies in Nigeria have reported several losses due to pipelines sabotage. For instance, Shell revealed in one of its reports that "for us we lose somewhere between 40,000 and 60,000 barrels, a day to crude theft."[161] It is also observed that the so-called Martyrs Brigade blew up Nigeria National Petroleum Corporation's pipelines (NNPC) in Edo State which affected oil production and the spill caused damage to the environment. About 180,000 barrels of crude oil was suspended per day because of the closure of one of its stations located in Bonny.[162] Similarly, the Shell Nigeria Exploration and Production Company's vessel was attacked and about 225,000 barrels of crude oil per day was shut-down as a result.[163] It is observed that the sabotage of oil pipelines has significantly reduced the country oil production capacity. The economic development of

[158] Klaus Toepfer, the United Nations Environmental Programme Executive Director in his presentation titled "Fight Root Causes of Civil Unrest That Can Lead to Terrorism" Presented in Kazakhstan at Regional Environmental Action For Central Asia on 21/09/2001.

[159] Ajal Wale, Achieving Environmental Protection through the Vehicle of Human Rights: Some Conceptual, Legal and Third World Problems, (1995) 2 (1) UBIJ 41.

[160] Chilenyen Nwapi, A legislative proposal for public participation in oil and gas decision-making in Nigeria, Journal of Africa Law (2010) at 184.

[161] The report is available at< http://www.shell.com/static/nigeria/downloads/pdfs/2002report_finalpdf at 15-17> accessed 15 September 2018.

[162] ibid, 146 above at 41.

[163] Mend Attacks Shell Bonga Field, This Day, The Sunday Newspaper, 22/06/2008 at page 10.

Nigeria is also dependent on the way the natural resources are managed both human and environmental. However, it could be suggested that for the country to develop without depleting natural resources or causing further environmental problems, the government needs to show initiative and willingness to strike the right balance between the country's economic growth and environmental needs by way of regulations and policies. This can be achieved with cooperation and help from local communities as well as support from transnational corporations because they play a decisive role in economic development of the countries where they operate. Until amicable solutions are agreed from all parties involved, environmental degradations and other forms of environmental problems will persist.

It is established from the above that despite the efforts to minimise environmental degradation through international environmental laws and United Nations Conventions, the identified challenges at national level need to be addressed for effective implementation of international conventions and environmental laws in developing countries. One of the factors discussed was the lack of host state's initiative to tackle environmental problems mainly for economic reasons. It is also noted that lack of modern technology and highly skilled personnel had forced majority of developing countries to rely on transnational corporations to generate revenue. The adoption of Production Sharing Agreement evaluated in chapter 3 of this research can play a significant role to enable the host state to acquire necessary technology needed for exploration. The PSA enables the host state to keep the technology used for the exploitation and exploration of oil and at the same time, the provision of local content within the agreement would allow them to train their indigenous engineers to be experts in the petroleum industry. Besides, local content was introduced as long-term socio-economic development strategy which encourages the development of the local industry, enhance job creation, cross-sector growth and capacity building.[164] It is established that the rationale behind the local content includes local factors such as political, economic and social environmental factors.[165] It is also the aim of the host state to allow short-term foreign investment in order to create local participation in the oil industry in the long-term. In addition, clauses on environmental protection can be inserted into petroleum agreements because it is claimed that environmental issues had not been given the right attention in such agreements. It is noted from the World Bank's survey on Environmental Impact Assessments (EIAs) that "much of the emphasis of the EIAs process appears directed towards the approval of oil and gas projects, rather than to a life cycle approach for minimizing environmental and social impact".[166] The host state should ensure that oil and gas agreement does not focus only on the potential economic benefits for the country but provide obligations for the host state and transnational corporations to safeguard economic, environment and community rights.

Public awareness in tackling environmental problems had been thoroughly investigated and it is established that media and social network can play important roles to enhance public awareness of certain environmental regulations and policies. Notwithstanding, the host state may need to strengthen the effort to educate the public and provide some essential amenities to improve the poor people's standard of living as emphasised by the United Nations. In relation to the issue of transparency, it is understood that the host state must be more transparent and ensure environmental information is available and can be accessed by the public. This would enhance public knowledge and the likely consequences of causing damage to the environment.

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[164] Berryl Claire Asiago, The Regulatory Rationale for Local Content Requirements in the Petroleum Industry, International Energy Law Review (2017) at 235.

[165] ibid.

[166] Eleodoro Alba ed., 2010, World Bank, Environmental Governance in Oil-Producing Developing Countries 1, available at <http://siteresources.worldbank.org/EXTOGMC/Resources/336929-1266963339030/eifd17_environmental_governance.pdf > accessed 17 September 2018.

The local people have a crucial role to play in economic development of the country as well as environmental management as Nwapi points out, local people have knowledge of the environment where they live and this is important to the conservation and sustainable use of natural resources which can facilitate local adaptability.[167] Importantly, local participation in exploration activities is recognised and encouraged by the following provisions; Agenda 21 of the Rio Declaration, principle 22, the Desertification Convention, articles 3 (a), 10 (2) and 19(1), Agenda 21, paragraph 23, the Biodiversity Convention, article 8 (j) and ILO Convention 169 among others.

5.9.4 The enforcement of environmental regulations in developing countries

The cases of waterway pollution, oil spillage and poor air quality have been highlighted in this research but there is no clear evidence that regulatory agencies have successfully brought an action in a civil court in Nigeria. Majority of the victims of environmental pollution have had no choice but to settle out of court or received unsatisfactory compensation. The solution to the enforcement could be an effective regulation and the host state's willingness to enforce environmental policies rather than focus on economic growth and its challenges but pay little attention to environmental law enforcement. It is therefore pertinent to examine the Nigerian enforcement mechanism and regulation under 1999 constitution which is regarded as the basis for enforcement power in relation to oil pollution and environmental law.

Enforcement has been defined as "an authorised exercise of power against a person who has not voluntarily complied with an order within the time allowed by the authority making it".[168] A range of legislative provisions may be adopted to govern the enforcement such as civil procedure rules and rules of court to ensure a person is returned into compliance or punished

[167] Chlenye Nwapi, A legislative proposal for public participation in oil and gas decision-making in Nigeria, Journal of African Law (2010) at 195.
[168] Trischa Mann, *Australian Law Dictionary* (3 ed.) (2017) Oxford University Press.

appropriately by the state. It is argued that enforcement must achieve two things to be effective; fairness and deterrence. [169] Fairness can be achieved if it ensures that those who comply and respect the law are not at a disadvantage. However, it should also serve as deterrence to those who disregard the law and perhaps punish them for breaking the law. Most importantly, individual and corporate body must understand that breaking the law or non-compliance could result in enforcement. Cases of environmental pollution are highlighted in this chapter and it is established that lack of effective environmental regulation against the transnational corporations in the oil and gas industry is a threat to the fundamental rights of the local people and environment. The Nigerian government has attempted to address the issue but more needs to be done as the current mechanism lacks enforcement, it is ineffective and could not protect the rights of victims of environmental pollution. In addition, the current regulation fails to create any liability for the companies causing environmental pollution.

5.9.5 The lack of an enforcement mechanism in the host state

It submitted that under the Agenda of the Nigerian Regulation, civil and criminal liabilities were included. For example, the pollution of environment and oil spill arising from oil exploration, exploitation and production activities are classed as criminal offences and they can be challenged by the host state in the court of law. However, the provisions have been perceived as ineffective due to lack of resources and poor implementation. Tobi added that enforcement mechanisms under Nigerian laws are ineffective and weakened because of fraud, irregularities and a number of abuses.[170]Ladan's few on this point cannot be overlooked. He says that the lack of good governance, mismanagement, multiple standards and nonchalance

[169] L J Schiffer and A.B rumsy, *Criminal Enforcement in a cooperative environment* (1997) America Bar Association Continuing Legal Education Course of study, sb43,299 at 300.

[170] Nikki Tobi, "Judicial enforcement of Environmental Laws in Nigeria," (2005) 1 Environmental and planning Law Journal (EPLR), page 92.

are affecting the enforcement of environmental laws in Nigeria.[171] In addition, some cases of environmental pollution were not challenged due to lack of funds by the victims of environmental damage and available legal aids are for criminal cases and other civil matters such as road accidents. Nevertheless, there is a fund for advice and representation for civil matters under the s.8 of Legal Aid Act 2011 but it may not be compared to high legal representation and status of transnational corporations. For example, the case of ***Chief Joel Anare and others v Shell Petroleum Companies*** was delayed for 14 years and situations such as this may put unnecessary financial pressure on private claimants resulting in cases being abandoned due to financial constraints.

Furthermore, the technical rules of procedure have been perceived as a threat to environmental claims in Nigeria with a huge impact on judicial enforcement of environmental regulations in the country. For example, the requirement of locus standi, may put the local people in a difficult situation to bring an action against the transnational corporations as they are the indirect victims of environmental pollution. In ***OrontoDouglas v Shell Petroleum Development Company Ltd. & ORS,*** [172] the plaintiff filed the writ for declaration and injunction to stop the respondents from carrying on with the production of natural gas project until the required environmental impact assessment has been carried out as stipulated inEnvironmental Impact Assessment Decree No. 86 of 1992. The provisions require that the respondents comply with environmental Impact Assessment, but the plaintiff was not satisfied that the respondents had complied with the requirement hence he brought an action. However, the judge struck out the claim on the

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[171] Ladan, M.T.' *Role of the Judiciary in Environmental Governance in Nigeria', in the Judiciary and Environmental Governance: Comparative Perspectives* (Loius, J.K and Alexander R.P. eds...) Wolter Kluwer Law and Business, at page 527.

[172]*Oronto Douglas v Shell Petroleum Development Company Ltd. & ORS* (1998) LPELR-CA/L/143/97.

ground that the plaintiff has no locus standi to bring the claim, since he was unable to show prima facie proof that his right was engaged, or he has suffered any direct injury more than the local people and, on the ground that the procedure adopted by the plaintiff was confused.

It is pertinent here to explain the rule in Nigeria concerning locus standi. The claimant must establish enough interest which is peculiar to him personally and the court may not consider any other interest that he shares with the public or with members of the association. In addition, the locus standi focuses on the person bringing the claim before the court and not on the matter he wishes to have decided. Therefore, the concept of locus standi involves the ability of a person to institute legal proceeding in a court or tribunal. Flowing from this, the claimant who brings an action for damages as a result of environmental misuse must establish that he suffered damages as seen in ***Shell Petroleum Development Company Nigeria Limited v Chief Otoko and others***.[173] This case was instituted in a representative capacity and the Court of Appeal rejected the representative's action and argued that the persons who are to be represented and their representatives must have the same interest in the cause of matter. This also obtains in ***Amos v Shell BP Petroleum Development Country Limited***[174] where an action was also brought in a representative capacity for general and special damages. The defendants in this case constructed a dam across a navigable creek in the course of their exploration activities in Rivers State and an action was brought for damages, claiming that the erection of temporary dam had caused flood and obstructed the creek and it has made it difficult for the local community to maintain their usual activities as they were unable to pass with or use canoe to transport goods to and from the marketplace. The court held that the case was instituted by the representative on public nuisance and thereby dismissed the case.

[173] *Shell Petroleum Development Company Nigeria Limited v Chief Otoko and others* (1990) 6 NWLR Pt, 159-693.

[174] *Amos v Shell BP Petroleum Development Country Limited* (1974) ECSLR 486 190.

In the light of the foregoing, it is also pertinent to examine locus standi position in developed countries.

In the United Kingdom, the common law doctrine of privity of contract, states that no one can sue or be sued on a contract to which he is not a party.[175] This basic rule was reformed by the introduction of the UK Contracts (Rights of Third Parties) Act 1999. This Act has reformed the primitive rules and allowed a third party to enforce a term of the contract in certain circumstances. The Act provides that:

> Subject to the provisions of this Act, a person who is not a party to a contract (a "third party") may in his own right enforce a term of the contract if-
>
> (a) the contract expressly provides that he may, or
> *(b)* subject to subsection (2), the term purports to confer a benefit on him.[176]
> ...The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into."[177]
>
> "This section does not confer a right on a third party to enforce a term of the contract otherwise than subject to and in accordance with any other relevant terms of the contract.[178]

It is noted from the above provision that there is an exception to English common law doctrine, the rule of privity of contracts. The third parties who are not party to a contract but may suffer damages or loss because of breach of contract can enforce the term of that contract. However, the standing position is not the same on public law and administrative matters. Take for example the judicial review. The UK locus standi requires that the claimant has enough interest

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[175] Keith Abbott, *Norman Pendlebury and Kevin Wardman,* Business Law, 7th Edition (2002), Continuum, London & New York at page 167.

[176] Section1 (1) (a) (b) of the Contracts (Rights of Third Parties) Act 1999.

[177] ibid at S.1(3).

[178] Contracts (Rights of Third Parties) Act (n 117) at S. 1 (4).

in a related case to litigation according to the Supreme Act. Section 31 (3) of the Act provides that:

> No application for judicial review shall be made unless the leave of the High Court has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it is considers that the applicant has a sufficient interest in the matter to which the application relates.[179]

The above provision is confirmed *in* ***R. (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry***[180]where it was established that the public interest factor outweighed the general principle application. The applicant in this case challenged the UK government's claim that the result of consultation was favourable to the construction of new nuclear plant in the country. Greenpeace argued that the consultation process had been flawed. The High Court agreed with Greenpeace and held that government was bound by international law to provide full public consultation.[181] It was further highlighted that the consultation process was very seriously flawed, procedurally unfair and a breach of Greenpeace's legitimate expectation that there would be the fullest consultation. Insufficient information was given to the public and that the consultation document was misleading and a declaratory relief was granted. Similarly, in ***R v. Inspectorate of Pollution ex parte Greenpeace***,[182] The Greenpeace sought to bring judicial review against the decision of the Inspectorate of pollution to authorise the discharge of radioactive waste from the nuclear plant. Greenpeace argued that the group had sufficient interests to bring the claim and claimed that 2500 of its members living in the area and likely to be affected by the discharge of radioactive plant. The Court held that

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[179] Section 31 (3) of the Supreme Act 1981.
[180][2007] EWHC 311.
[181] By the virtue of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998 (the Aarhus Convention) which the UK government was a signatory to.
[182][1994] 4 All ER 329.

applicant's interest in the matter must be considered as well as the nature of relief and remedy sought.***R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd***[183] is a judicial review case in English law where the Movement successfully challenged the UK government's decision to give economic aid to the Pergau Dam, arguing that it was not required for the purpose of promoting the development of Malaysia. The government argued that the Movement had no sufficient interests to bring a judicial review claim. The Movement in response argued that as a charity itself distributing aid, the diversion of such huge amount affected its own actions, and this amounted to a greater interest. The High Court held that the Foreign Secretary had acted outside of his power, and it was unlawful to allocate £234 million towards the funding of a hydroelectric dam, on the grounds that the law only allowed him to allocate funds to economically sound projects. Additionally, in the United States of America, there are provisions which allow the third party to initiate a court action as established in ***Sieira Club v. Morton***[184]this is a supreme court of the United States case relating to standing under the Administrative Procedure Act. The Sierra Club filed injunctions against federal officials to stop them from granting licences for the development of the Mineral King Valley. The district court granted these injunctions. The U.S. Court of Appeals overturned the injunctions on the grounds that the Sierra Club failed to show that it would be directly affected by the development of the Mineral King Valleyother than the fact that the actions are personally displeasing or distasteful to them[185] and therefore did not have standing to sue under the Administrative Procedure Act. The appellate court also concluded that: A person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury, whether

[183][1995] 1 WLR 386.

[184]405 U.S. 727 (1972).

[185] ibid at 33.

economic or otherwise. In this case, where petitioner asserted no individualised harm to itself or its members, it lacked standing to maintain the action.[186] However, the Supreme Court agreed that the club had not suffered any injury but granted certiorari to review. Nevertheless, it is observed from the cases discussed here that the representative and individual may struggle to sue if they fail to establish that they have 'a sufficient interest or a direct link with the matter aside the general and common interest'.

Furthermore, another significant impediment to the enforcement of environmental laws is burden of proof and remedies. For environmental laws to be enforced in Nigerian Courts, the parties involved must prove their cases in accordance with the law. This requirement applies to all litigations, but it is not known whether environmental legislation requires a standard or burden of proof to institute an action. In addition, it is not disputed that in criminal law particularly in criminal cases the prosecution is required to establish burden of proof as the suspect is considered innocent until he is found guilty by the relevant court. On this point Tobi posits that it is still debateable whether environmental offences are crimes as predicted under the criminal laws. [187] The law is clear on this point. S.32 (4) of National Environmental Standards and Regulations Enforcement Agency (Establishment) Act 2007 (NESREA) provides that:

> In a judicial proceeding for an offence under this Act or any regulation made under it, the provisions of the Criminal Procedure Act or depending on the venue, the Criminal Procedure Code shall, with such modification as the circumstance may require, apply in respect of such matter to the same extent as they apply to the trial offences generally.[188]

[186] ibid Pp. 405 U. S. 731-741.

[187] ibid at 162, page 92.

[188] S 32(4) of National Environmental Standards and Regulations Enforcement Agency (Establishment Act,2007.

It is noted from the above provision that the same procedural requirements of the criminal cases would apply to environmental matters before the court. Therefore, the burden of proof must be established. However, environmental pollution matters are classed under civil cases and the burden of proof under the common law is on the balance of probabilities or preponderance of evidence, so the burden is on the claimant according to the provision under s.135-137 of the Evidence Act 1990.It was stated under the Act that:

> 135.*(1)* Whoever desires and court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> S.136. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side
>
> S.137. (1) In civil cases the burden of first providing the existence or nonexistence of a fact lies on the party against whom the judgement of the court would be given if no evidence were produced on either side, regard being had to any presumption that may arise on the pleadings.

It is observed from the above provisions that a burden of proof must be established and this requirement among other things have left the indigenous victims of environmental pollutions with limited choice, even some without recourse to court action. It could be argued that the current environmental regulatory mechanisms in Nigeria need to be improved to ensure the interest of the local people are protected so they do not bear the consequences of oil and gas exploration in their region. In addition, it is noted that Nigeria has enacted so many laws to minimise the problems of environmental degradation, but the current regulation fails to establish environmental liability for oil and gas exploration and development projects. The lack of enforcement is another obstacle, the state should ensure that the citizens comply with environmental law because having regulation without compliance is as bad as not creating one in the first place and the environmental problems would persist. Dr Inocencio’s perspective on enforcement cannot be overstated; he says that adequate regulation requires good enforcement mechanisms and there is no point of establishing an effective regulation if there is an absence of an effective enforcement mechanism.[189] It is further noted that the lack of public awareness in relation to environmental litigation has a huge impact on enforcement. Thus, the indigenous people should be educated and enlightened about their constitutional rights and duties particularly on environmental litigation. The case of ***John Eboige and others v Nigeria National Petroleum Corporation***[190]can be cited to buttress this crucial point. The claimants in this case failed to obtain justice because they initiated the court action after the time to make the claim had lapsed. The lack of awareness of their legal rights had prevented them to sue at the appropriate time. Therefore, public should have free access to environmental information otherwise the society could be hampered by lack of information and poor knowledge.

5.10 Conclusions

This chapter has highlighted certain environmental problems and observed that international environmental laws have been enacted, which can minimise the pollution effects if correctly enforced. It is also established that both the government and the public would have to contribute positively for effective implementation and enforcement of environmental laws. The chapter has examined some of the cases of environmental pollution and established in ***Chief Joel Anare and other v Shell Petroleum Companies***[191] that an environmental damage claim can be prolonged for up to 14 years. This unnecessary delay could send a wrong message to the victims of pollution and perhaps discourage potential claimants from bringing their claims forward and challenge the transnational corporations. In addition, the decision which emanated from this case revealed that environmental laws are far from achieving their primary objectives. The State should impose obligations on the Court to consider environmental aspects of a case when

[189] Dr Flavio G.I Inocencio, *Independent regulatory agencies in the oil and gas industry*, International Energy Law Review (2018) at 138.

[190]*John Eboige and others v Nigeria National Petroleum Corporation* [1994] 5 NWLR.

[191]Chief Joel Anare and other v Shell Petroleum Companies Suit No HCB/35/89.

making decision on pollution cases but awarding damages to the pollution victims would not solve the environmental problems. The Polluters on the other hand should be ordered to take reasonable steps to protect the environment and the state can create environmental courts with technical experts from environmental science who are highly skilled in ecology.

The matter of public awareness was explored, and it is suggested that the public should be enlightened and educated on environmental regulations. The subject of environmental issues could be introduced into the school syllabus to enhance the awareness and should be made compulsory like mathematics and English language. It is believed that if environmental subject is taught at the primary education level, it will create great awareness about the environment. The State can also promote awareness among operators and actors in the oil industry, they should be well informed of their responsibility on the environment. Ultimately, it is important that the government encourage the transnational corporations to protect the rights of local people as this move would prevent the likely harm that the local community and their environment encounter. The transnational corporations should also be encouraged to take reasonable steps towards maintaining effective environmental management systems and risk assessments and ensure they comply with environmental regulations. Petroleum exploration activities could be carried out with extra care and consideration should be given to the environment. Consequently, keeping ecological balance natural and protecting the environments require unrelenting efforts from the government, transnational corporations and the public.

CONCLUSIONS

This concluding chapter has made an attempt to go over the main points discussed in the five substantive chapters of the thesis. As the following discussion will point out how the thesis adequately dealt with the three main research questions.[1] All the research questions have been carefully attended to and chapters 1 and 2, through thorough examination of BITs related investors' dispute as well as striking the right balance between the host state and the transnational corporations have demonstrated the current structure of the oil and gas contracts. It was established in chapter 1 that there is a legal framework which protect foreign investors' interest and their investment in host states territories through BITs. The same legal mechanism however failed to balance the needs of the host states and transnational corporations. As discussed in chapter 1, international investment treaties have failed to regulate the activities of transnational corporations and the review of the literatures in this work has indicated that the BITs are one sided, catering for only the investors' protection.[2] Nevertheless, host states have successfully challenged the conduct of transnational corporations through arbitration because investment treaty arbitration is viewed as public law, it replaces courts with a private model of adjudication in matters of public law.[3] It is established that Investment Treaty Arbitration (ITA) has been reformed; its structure, substance and procedures are geared towards achieving greater

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[1] 1- What is the current structure of oil contracts and to what extent can parties' commitment be altered to ensure the sustenance of economic stability? 2- Which contract type is the best for development and financial purposes? 3- What are the causes of imbalance in the oil contract and to what extent have the principles of international environmental law been utilised at a state level and whether developing countries have been able to overcome the pressures from transnational corporation on the issue of environmental law?

[2] T Walde and S. Dow, "Treaties *and Regulatory Risk in Infracstructure Investment- the Effectiveness of International Law Discpline versus Sanctions by Global Markets in Reducing the Political and Regulatory Risk for Private Infrasstructure Investment*"34 Journal of World Trade 1 (2000) at pg 19.

[3] Valentina Sara Vadi, *cultural Heritage and international investment law*: a stormy relationship 9 International Journal of Cultural Property 2008) page 1.

coherence by balancing competing human rights and economic interest and values.[4] Petersmann and Franccioni added that the present structure of the ITA coupled with the development of substantive norms of international investment law are composed of a more balanced approach to resolving problems between competing interests and it has so far proved itself as a legitimate system for rights adjudication.[5]

The chapter examined some investor/state disputes and it was discovered that some exception clauses were incorporated into their agreements which the court regarded as lawful because they do not constitute indirect expropriation. This conclusion is supported by outcome of *AES Summit v Hungary*,[6] where the tribunal found that Hungary's enactment of the Electricity Act Amendment 2006 did not breach investment standards under the Energy Charter Treaty. In *Plama v Bulgaria award*,[7] the tribunal held that concealment of information amounted to fraud, which violated the host state's domestic law and international law and as a result no protection of the Energy Charter Treaty could be granted to the investor and his investment. Going further, in *Genin v Estonia*,[8] the tribunal held that Estonia was right to act as a sensible and concerned supervisor of the banking sector and in *Muhammad Ammar Al Bahloul v Tajikistan*,[9] the tribunal concluded that the state's temporary failure to issue an exploration licence was not considered expropriation unless it could be stablished that the state terminated its contract or it has refused to perform its obligation under the contract. In addition, the case of *Maffezini v*

[4] Ahma Ghouri, Positing for Balancing Investment Treaty Rights and the Rights of Citizens, Contemporary Asia Arbitration Journal 2011 4 (1) at 95.

[5] Ernst-Ulrich Petersmann and Francesco Francioni, Human Rights in International Investment Law and Arbitration, (New York: Oxford University Press, 2009), at pg 3.

[6] ICSID Case No.ARB/07/22.

[7] (ICSID case No ARB/03/24) Award August 27, 2008.

[8] ICSID Case No. ARB/99/2 Award June 25, 2001.

[9] Chamber of Commerce Arbitration No. (064/2008).

Spain[10] established that failure to comply with the host state's law and regulations might exclude foreign investors from treaty right to which they would otherwise be entitled. Similarly, the tribunal acknowledged in *Fraport v Philippines*[11] that respect for the laws of the host state is a critical part of development and held that there was no investment because Fraport had violated the law of the host state and as a result the tribunal ruled against Fraport's allegation of breaches by the host state of certain provisions of the BIT and dismissed the case. In *WDF v Kenya*,[12] the tribunal held that agreement stained with corruption could not be enforced and that bribery is contrary to the international public policy of most countries. Whereas, unilateral termination of a petroleum agreement is itself a fundamental breach, as the tribunal concluded in *Occidental v Ecuador*, [13] the principle of proportionality is emphasised because it provides that administrative measures should seek to strike the right balance between the host state and investor's investments' interests. The tribunal findings in this case affirms that the principle of proportionality must be observed in a variety of international law settings and it must be applied to potential breaches of BIT's obligations such as fair and equitable treatment obligations. Similarly, the tribunal held in CMS v Argentina[14] that provision of the BIT had been engaged because Argentina had acted contrary to the investment agreement made before its economic crisis in 2001. Consequently, the tribunal held in *Saluka v Czech Republic*[15] that the fair and equitable standard was breached because of the non-transparent and discriminatory way in which the government had acted.

[10] ICSID Case No. ARB/97/7, Award November 13,2000.

[11] ICSID Case No.ARB/03/25, Award August 16, 2007.

[12] ICSID Case No.ARB/00/7, Award October 4, 2006.

[13] ICSID Case No. ARB/06/11, Award October 5, 2012.

[14] ICSID Case No. ARB/01/8, May 12, 2005.

[15] IIC 210 2006, Dutch/Czech BIT.

In the light of the analysis of the above cases, it is clear that arbitrators are challenging the conduct of transnational corporations. The decisions emanating from the cases analysed in the chapter might encourage the host states to raise defences and bring claims regarding investor conduct to the tribunal in order to justify their alleged violations of treaty obligations. It is observed that investment treaties impose some reciprocal obligations on host states as well as foreign investors. Therefore, it could be submitted that the tribunal's consideration of the investor' obligation was derived and based on international law principles known as the principle of good faith, the principle that nobody can benefit from his own wrong, and transnational public policy which requires compliance with both domestic and international laws. The chapter further pointed out that developing country with a weak judicial and regulatory system could emulate Ecuador by reforming their judicial system. Ecuador successfully reformed their laws following protracted cases and arbitration hearings with Chevron and the realisation that the country suffered from poor and week regulatory system, but the country eventually succeeded in swaying some of the court and arbitration rulings to their favour.[16]

Chapter 2 sought to provide an answer to the second part of the question 1 of the research question to what extent can parties' commitments be altered to ensure the sustenance of economic stability? In addressing this, chapter 2 gives general guideline on how the right balance may be struck between the host states and transnational corporations. The imbalance in oil and gas contracts has been described by Sornarajah as a power-base which seeks to secure the rights of business over the rights of people and this underlines the need for an evolution from a host state with duties towards the transnational corporations to a host state with rights

[16] This decision was reached following a mass action against Texaco where 74 Ecuadorian represented the interest of over 30,000 inhabitants in eastern Ecuador known as Aguinda v. Texaco inc, 142 F. supp. 2d 534 (S.D.N.Y 2001).

in relation to the investor.[17] The need for a balance is also in consideration of the positive impact of foreign companies' investments in the economies of host states through the transfer of technology, expansion of trade, faster productivity growth and higher wages, the training of human resources, closing of the knowledge gap and the gap between developing and developed states. As the chapter found, one of the most effective ways to strike the right balance is for the BITs to focus on rights and responsibilities because one of the disadvantages of bilateral treaties is that they have primarily focused on the rights and not on the responsibilities of transnational corporations. The case of *Metalclad Corp v The United Mexican States*[18] examined in the chapter highlighted where the tribunal held that both rights and responsibilities are needed to be considered when determining appropriate compensation. The significant point here is that in determining the award, the tribunal only looked at the Metaclad's rights and investment but ignored its obligation to clean up the hazardous material which formed the basis of the original agreement. Metalclad case is therefore one example of the failure of transnational corporations to live up to expectations and fulfil their responsibilities.

The principle of non-discrimination was thoroughly examined in chapter 2 and findings have shown that one of the dangers of the BITs is that, it introduced what Joseph regarded as reverse discrimination. He argues that transnational corporations are being treated well, with greater protection, than locally incorporated firms[19] Nicolas posits that the principle of non-discrimination constitutes a cornerstone in different fields of international law; it covers a wide range of area and forbids indirect discrimination. Some cases relating to non-discrimination

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[17] Muthucumarawamy Sornarajah, *the international law on foreign investment* 3rd ed, (Cambridge University Press, 2010) at pg 169.

[18] ICID-Award, Case No. ARB(AF)97/1, August 30, 2000.

[19] Stiglitz, Joseph E." Multinational Corporations: Balancing rights and responsibilities." Proceedings of the Annual Meeting (America Society of International Law). Vol 101, American Society of International Law, (2007) at pg 55.

have indicated that a commitment to non-discrimination or equality remain a critical area of international trade law. Therefore, in order to strike the right balance, the host state should ensure they enter into BITs with utmost priority given to discrimination issues. A review of a number of nationalisation cases in this chapter revealed that in order to justify the taking of foreigners' properties, certain criteria must be satisfied. The existence of a 'national interest' or 'public need', the related expropriation must not be a discriminatory one and the expropriating state must be ready to pay adequate compensation as established in the *Libyan American Oil Co (LIAMCO) v Government of the Libyan Arab Republic*. [20]. In this case, the tribunal held that the Libyan government took several measures and those measures were purely discriminatory nationalisation, illegal and wrongful. It is evident from LIAMCO that transnational corporations are also concerned about discrimination, particularly when host states unilaterally enact law that will prevent them from carrying on their business activities.

The chapter further established that the step towards striking the right balance includes transparency, that is, the legal framework for the business activities between the transnational corporations and host states are readily apparent and that important decisions that may affect their dealings should be traceable back to the initial legal framework. Thus, any attempt from either party to violate their obligations can be detected. The tribunal emphasised in Tecmed v Mexico[21] that a state must act in a consistent manner, free from ambiguity and totally transparent in its relationship with the foreign investor. Similarly, in Pope and Talbot's case,[22] the tribunal held that Canada was liable to the investor for the denial of a fair and equitable treatment under the treaty. However, the tribunal held in Champion Trading v Egypt ICSID[23]

[20] (1977) 62 I.L.R. 140.

[21] ICSID Case No. ARB(AF)00/2, Award, 43 I.L.M. 133 (2004).

[22] *Pope & Talbot Inc. v Canada*, Interim award, IIC 192 (2000).

[23] ICSID Case No. ARB/05/8, para 331.

that the host state may not be found to violate any rules if regulations are publicised and transnational corporations are made aware beforehand of any rules that govern their business activities. It is therefore understood from this chapter that transparency is integral to the maximum protection of investments and accordingly, developing countries should endeavour to have a legal mechanism in place to give room for full transparency and investor participation. Consequently, it is submitted that transnational corporations should also strive to disclose publicly their dealings with the host state government, so that the citizens of the developing state will be able to hold their government accountable.

Consequently, this chapter attempted to fill the legal loophole in relation to transnational corporation as a subject of international law. The chapter, through examination of literature in this area highlighted some crucial points to be aware of. It was argued that transnational corporations are not subject to international law because some authors consider that, in the current stage of international law, the international personality of transnational corporations remain an open question.[24] However, the chapter tried to identify some of the international instruments that focus on the activities of transnational corporations and asserted that there are two ways to investigate this; through binding treaties such as Bilateral Agreement and International Labour Organisation (ILO Conventions) and other measures or national laws which focus on the activities of the transnational corporations. But the chapter concluded after thorough examination, that the provision of ILO Declaration is voluntary in nature and is intended to serve as a guide to transnational corporations, workers and host states. Thus, transnational corporations may decide not to abide by it because sanctions are not imposed on them. Going further, the chapter examined other international mechanism such as the UN Guiding Principles on Business and Human Rights 2011, the Global Compacts 2000 and the

[24] M Shaw, International Law 5th Edition, Cambridge, Cambridge University Press, (2013) at pg 225.

Organisation for Economic Co-operation and Development 2011 (OECD). It is also established that guiding principles[25] are not binding on transitional corporations but embody certain human rights norms that are legally binding on them under national law or international law. Whereas, non-governmental organisations (NGOs) have expressed their dissatisfaction and claimed that Guiding Principles imposed non-binding obligations on business and described it as an emphasis on processes at the expense of substance.[26] Consequently, the international Court of Justice established corporate legal personality and legal responsibility in the Barcelona Traction,[27] but emphasised that 'only the company, which was endowed with legal personality, could take action in respect of matters that were of a corporate character'. Similarly, in AhmodouSadio Diallo, the Court of Justice upheld the decision of Barcelona Traction and added that "in determining whether a company possesses independent and distinct legal personality, international law looks to the rules of the relevant domestic law."[28] Thus, it was established that the question whether the transnational corporations have international personality requires a case-by-case examination of the relevant appropriate norms of international law and Vincent on this point asserts that a limited and derived personality may be conferred only by customary law, treaties and internationalised contracts usually concluded between a host state and a corporation and mostly in oil and gas industries.[29]

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[25] Principle 14 of Guiding Principle.

[26] Wouters and Chane, "Multinational Corporations in International Law" Working Paper NO. 129 (2013) at pg 17.

[27] [1970] I.CJ. Rep.3 (ICJ).

[28]*Ahmadou Sadio Diallo (Republic Protection of Guinea v Democratic Republic of the Congo*), Preliminary Objections, 24 May 2007 [2007] ICJ Reports 194.

[29] Chetail, Vincent, the Legal Personality of Multinational Corporations, State Responsibility and Due Diligence: The Way Forward 9 December 6, 2013) Unity and Diversity of International Law. Essay in Honour of Prof.Pierre-Marie Dupuy, at pg 113

Findings from the chapter have shown that oil and gas contracts reflect rights and obligations of the parties to the agreement, the host state and transnational corporations and in some cases the contracts spell out some unique clauses stating that the contract is governed by international law as well as arbitration clauses in case of a disputes. In addition, this fact was confirmed by the tribunal in ***Calasiatic v Libyan Arab Republic***[30] as analysed in the chapter that:

> In other words, stating that a contract between a state and a private person falls within the international legal order means that for the purposes of interpretation and performance of the contract, it should be recognised that a private contracting party has specific international capacities. But, unlike a state, the private person has only a limited capacity and his quality as a subject of international law does enable him only to invoke, in the field of international law, the rights which he drives from the contracts.[31]

The chapter pointed out that the court's interpretation was shared and supported by many literatures and Portmann posits that in arbitrator's view, then the choice of international law as the proper law of contract suggested that the parties to the contract as in the above case were bestowed with limited international personality for the purposes of the contract. Thus, it is submitted that petroleum contracts can be relied upon to regulate the conduct of transnational corporations at national level.

Consequently, the chapter examined the various ways in which Nigerian domestic laws have impacted on transnational corporations. Firstly, the foreign companies were required to be reincorporated locally by virtue of S.54 of the Nigerian Companies Act 1968 in order to bring transnational corporations under the ambit of the law. However, evidence from the cases explored in this chapter have revealed that the provision which required that transnational corporations should be reincorporated with the aim of bringing them under the ambit of Nigeria

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[30] Award on the Merits, 1977 53 ILR 422.

[31] ibid paragraph 47 at pg 58.

domestic law has not achieved that goal because it is an established law in Nigeria that a holding company and its subsidiaries are distinct and separate legal entities.[32] It is also an established law that a subsidiary is not regarded as an agent of the parent company but classed as a separate legal person.[33] The landmark case of Akpan v Shell[34] has proved otherwise. Akpan case shows that parent company can be held liable for the wrongful acts of their foreign subsidiaries. The court held that there is ‘an international trend to hold parent companies liable in their home state for injurious acts of their subsidiaries.’ Secondly, financial disclosure was made compulsory for the company under Nigeria Companies and Allied Matters Act 1994 (CAMA).[35] This moved is perceived as an important measure to control and promote Corporate Social Responsibility (CSR). However, a careful examination of literatures has indicated that CAMA together with previous Nigeria company law have been infective and unable to address the problems of transnational corporations, but some human rights issues have shown great development in that aspect. Therefore, the chapter concluded that Gbemre v Shell’s case [36] was the case that signalled the possibility of using human rights provisions for the purpose of checking transnational corporation activities in Nigeria. Prior to this case Nigerian Judges regularly honoured the economic benefits of the country over human rights protection.

It is observed from the analysis of various petroleum agreements in chapter 3 that the oil agreements in general have helped the host sates to uphold and benefit from the United Nations

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[32] MO Kanu & Sons v FBN Plc (1998) 11 NWLR (PT 572) 116 at 121.

[33] Musa v Ehidiamhen 1994 3 NWLR (PT 334) 554 CA.

[34]District Court of the Hague (Rechtbank’s Gravenhage), 30 January 2013, Akpan and others v Royal Dutch Shell and Shell Petroleum Development Company of Nigeria Ltd, (2013) LIN BY9854 (Netherlands) Akpan 2013.

[35] S.331 of CAMMA.

[36]*Jonah Gbemre v Shell Petroleum Development Corporation of Nigeria Ltd and* Ors (suit no FHC/B/CS/53/05, Federal High Court, Benin Judicial Division, 14 November 2005.

General Assembly Resolution 1962. One of the research questions is to ascertain the best oil and gas contract type for development and financial purposes and chapter 3 of the thesis considered this in depth and the findings have shown that through oil and gas contracts, the host states have taken control over their natural resources. This was a departure from the era when exclusive rights to explore and exploit oil were granted to the transnational corporations for 75 years with freedom to control exploration activities under the old concessions. Nigeria was once a victim of old concessions as findings from this research revealed that Nigeria awarded a concession contract to Shell D' Arcy in November 1937 to explore, produce and market petroleum throughout Nigeria without limitation in terms of duration and geographical location. The chapter discovered that many concessions between developing states and transnational corporations have failed to produce anticipated gains for the developing states because the agreement were constructed as traditional matters of public policy owing to their economic focus and development operations. Therefore, many of the old concessions have been unilaterally changed when the states became aware that the old concession agreements, they had signed were mostly favourable to the transnational corporations. They had given transnational corporations rights to search, to extract and exploit in exchange for royalty payment which were often little by comparison with the transnational corporation gains. The old concessions were regarded as unbalanced because of their long duration[37] and the large geographical area involved and as a result, the host states challenged the concessions following the decolonisation movement in the 1960s. The states were capitalising on the provisions of Principle of Permanent Sovereignty Over Natural Resources (PSNR) contained in the 1962 Resolution, and it was established that the main drive of PSNR was to promote the economic independence of developing states through the nationalisation of natural resources previously

[37] Article 3 (d) of Kuwait oil concession 1934 awarded oil concession for 75 years given wide freedom in controlling its exploration activities.

under the control of transnational corporations. Similarly, the emergence of the Organisation of Petroleum Exporting Countries (OPEC), the expropriation after nationalisations, the renegotiation of contracts and the creation of the international Economic Order have made it possible to remove many of the unfavourable features associated with old concession. An in-depth examination of modern concessions has proven that the modern contracts have rebalanced issues that were regarded as excessive in the traditional concession.

Nigeria eventually adopted joint ventures (JV) model and is primarily used in onshore and shallow water operations but the evaluation of its features has revealed some of the associated problems with Nigerian JV. The poor funding due to imbalance in financial capacity and it is a common problem among joint ventures partners. Transnational corporations may be financially sound, but the host state has other pressures on its resources and could not meet up with the cash call requirement under joint ventures. The findings have shown that there is downside of sharing risks cost with transnational corporations under JV, it makes the host state a responsible and direct participant in the extraction of natural resources. It comes with a huge responsibility such as liability for environmental damage and the principles of international environmental law have established that those who cause harm to environment should pay for the damage resulting from their activities. Therefore, the host state participation in joint venture projects may have adverse impact on the application of necessary laws to deal with pollution crisis. In addition, one of the identified problems is the challenges from the host community. The local community agitate and demand for the development programmes and it has led to several disruptions and explorations activities have been affected as a result. Consequently, as the oil and gas industry are expanding, acreages are being allocated in deep offshore areas requiring more funding and advanced technology. Therefore, exploring other options is perceived as the right solution. This factor amongst other things led to adoption of PSA in Nigeria. Several oil producing countries are also using PSAs as established in this research that

Brazilian government believes that it is the best option for the newly discovered sub-salt reservoir and preferred it over the modern concessions.

Service Contracts are extensively evaluated in this chapter. It is observed that this type of oil and gas contract confers greater control on the host state and its representative National Oil Company. On one hand, a service contract allows the host state to retain the full control of exploration activities being produced on its territory, while the transnational corporation on the other hand carried out exploration activities with the anticipation of getting paid for the services rendered to the host state. Service contracts have over the years made it possible for the host state to acquire the transnational corporations' capital and expertise without transferring production ownership and oil field to the transnational corporations. However, in comparison with the PSA the two contracts have some similarities, the transnational corporations can recover production costs through the sale of produced oil in these two contracts and it is known as cost oil under PSA. Going further, both contract types allow easy access to transnational corporations' finances, technology and highly skilled personnel. Consequently, the most notable difference with PSA is that the host state becomes the property owner of all equipment and installation used in exploration activities. This factor makes PSA standout because it is significant for developing countries which are struggling to fund or invest in petroleum exploration activities themselves, so that they may use the retained installations to build an independent oil and gas industry. Ultimately, a careful examination of the features of all the contract types presented under chapter 3, it appears that PSA has many features which makes it standout and preferable among stakeholders than other types of oil contracts in the industry. PSA features appear to be extremely beneficial and advantageous to those host state with very limited resources to invest. It is also a good choice for the host sates where reserves were large like Nigeria, Brazil and other developing countries that are willing to enhance their productivity. Additionally, PSA offers developing countries a great opportunity to create job for the host states' citizens as clearly indicted in in different legislation examined in this research. The inclusion of Local Content (LC) under PSA has made it a compulsory for the transnational corporations to source locally a percentage of labour, goods and services as part of the conditions for being allowed to explore and produce oil in their country.

Chapter 3 examined a number of related oil contracts and it is observed that the oil and gas exploration projects are associated with risks from exploration to production and unanticipated change of circumstances may occur to justify non-performance of a party's obligation under a petroleum contract. Therefore, chapter 4 in an effort to deal with one of the research questions, the causes of imbalance in the oil and gas contract first explored the risks associated with oil contracts and analysed some of the important clauses in an exploration and exploitation agreement. It is noted from the chapter that political unrest, revolutions, wars and embargoes amongst other thing are causes of interruptions in majority of oil and gas producing countries and it is important to reduce some of these risks. Thus, Chapter 4 suggested various ways in which the associated risks can be minimised. One of the possible means is by obtaining political risk insurance from Multilateral Investment Guarantee Agency (MIGA), a member of the World Bank Group. The role of this institution is to promote and protect transnational corporations against commercial risks in developing countries. Risk can be shared by involving the host state through its national oil company in the management of the project while demonstrating that they understand the host states' economic and social problems. Additionally, the transnational corporation may enter into a loan agreement with a project lender with a promise that repayment will be made from the profits generated through the exploration project. The parties may also consider inserting a number of clauses in oil and gas contracts so that they will be able to share future risks among themselves. An examination of relevant clauses such as a stabilisation clause, renegotiation clause, force majeure clause, arbitration clause and applicable law clause were carried out and it is noted that stabilisation clauses from transnational corporations perspectives that these clauses contain certain risk-mitigation provisions to protect investment from likely risk such as expropriation, nationalisation and other circumstances on which the host state can capitalise to impose new law on foreign investors and their investment as established in the following cases analysed in the chapter; *Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic,*[38] where the arbitrator pointed out that 'the recognition by international law of the right to nationalise is not sufficient ground to empower a State to disregard its commitments, because the same law also recognises the power of a State to commit itself internationally'. Similarly, in the *Government of the State of Kuwait v American Independent Oil Company (Aminoil), Adhoc Award,*[39] the arbitrator found that there was breach of the stabilisation clauses and held that the stabilisation clauses rendered expropriation unlawful. These cases reaffirm that stabilisation clauses cannot be overlooked, it must be honoured otherwise the expropriation will be unlawful. As noted in this research that if the host state willingly agreed and inserted stabilisation clauses in the exploration agreement, then the host state will be bound by the terms of agreement not to unilaterally change the law that would breach its obligations under the contract. Additionally, a careful examination of renegotiation clauses has revealed that inserting the clause in exploration agreement will help the parties to keep their investment relationship alive and ensures the right balance is struck when the circumstances changed, and that change can be justified. Therefore, a renegotiation clause can be relied upon to invite other party to resolve the problems.

In relation to the arbitration clauses, it was discussed that arbitration clauses cannot be excluded even if the contracts are carefully drafted by the parties. The finding of the research could help

[38] (YB Com ARB 1979,17).

[39] March 24, 1982, (1982) 21 I. L.M. 976.

contracting parties to identify the associated risks with exploration agreement and what the parties can do to minimise it. The majority of the host states have opted for arbitration for settlement of disputes including Nigeria even though tax related disputes are not arbitrable in Nigeria as pointed out in this research that Nigeria courts have applied a number of principles to consider the arbitrability of tax related disputes. The chapter examined the *Statoil (Nigeria) Limited & Anor v. Federal Inland Revenue Service (FIRS) & Anor*[40]. Here the court argued that if the transnational corporations were successful with arbitration proceedings, the FIRS would be affected and loses income with arbitral award. The significant of the court ruling in this case is that it showed how judges are deviating from their primary function which is to apply and interpret the law. They have attempted through this case to create new law and the only justification was that subsequent arbitral award would impede FIRS constitutional and statutory power to collect tax. A review of Nigerian cases discussed under the arbitration clauses may lead to the conclusion that Nigerian courts have applied a number of principles to consider the arbitrability of tax related disputes. It was furthermore discovered that the court decision was not stated in any of the Nigeria statutes not even in the relevant Act of parliament on arbitration matters. The Arbitration and Conciliation Act 2004, which provides that 'a court shall not intervene in arbitral proceedings in any matter governed by this Act except where so provided in this Act'[41] The deviation from an Act of Parliament means that arbitration in the country cannot be predicted since judges can overturn the decision as they wish. Accordingly, transnational corporations should be aware of the associated risk with Nigerian arbitration clauses as only commercial transaction disputes are subject to arbitration despite the provisions under Arbitration and Conciliation Act 2004.

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[40] (2014) LPELR-23144(CA).

[41] S.34 of Arbitration and Conciliation Act 2004.

Consequently, chapter 5 examined environmental principles and the extent to which they have been implemented by the host states and cited Nigeria as a case study. It is established that Nigeria has enacted numerous pieces of environmental legislation to protect the interest of transnational corporations from burden that such Acts might impose on the transnational corporations and some of these laws were thoroughly examined. The chapter highlighted some of the challenges facing environmental principles and their implementation.[42] Evidence from the chapter has shown that victims of oil spills resulting from acts of vandalism by third parties are not protected. They could not be held liable for the wrongful act of a third party. Section 11 of Oil and Pipelines Act, 1956 was criticised because it revealed an imbalance between environmental and economic considerations. The Act exempts the transnational corporations from paying compensation in the event of oil-spill incident and compensation would be payable to the victims if injuries occurred as a result of direct activity of the oil company and transitional corporations have capitalised on this loophole and used it as a defence. This provision shows a degree of unfairness because the law failed to consider the case of corrosion failure and leaking of pipeline that is unrelated to sabotage and the grievances of innocent victims of sabotage which resulted from oil-spillage and pollution are not being catered for. Thus, the law needs to be reviewed and it could prove to be problematic if left unattended. The chapter therefore, pointed out that this Act offered maximum protection for the transnational corporations and their business interest. Similarly, it is established that Nigeria's subsequent legislation, Petroleum Drilling and Production, 1969, also failed because there was no provision to deal with cases of non-compliance and its provisions were perceived as ineffective as a result. The Act was criticised for the lack of transparency by stipulating that detailed information obtained

[42] Identified obstacles include, corruption, the lack of government initiative, low education, lack of finance, lack of public awareness, poverty, poor administration, social and economic problems.

from licenses be kept confidential. Above all, the Act lacked enforcement mechanism and cannot be enforced.

Furthermore, the provisions of Oil In Navigable waters Act, 1968 were thoroughly analysed and the findings revealed that there was no provision for victims of oil spills like Oil and Pipelines Act, 1956 mentioned above. It allowed oil discharge if the polluter can establish that the discharge was to safe life, to secure the vessel and to prevent damage to vessels. The chapter pointed out that discharge of oil from vessel could be managed by effective maintenance, human errors should not be a defence for polluters and position of the law should be clearly explained, if vessel operators are unable to fulfil their environmental obligations. Therefore, leakage of the oil into the water due to improper maintenance should not be accepted as a measure of self-defence. It was suggested that Nigeria could borrow good practice from the UK after careful examination of section 6, UK Prevention of Oil Pollution Act, 1971. UK Act has robust system in place, it provided for defences as Nigeria but clearly explain the circumstances when the defence may not be relied upon and such vital provisions were absent from Nigeria Oil In Navigable Water Act. Nigeria can emulate the UK by introducing a provision to deal with discharging of oil into water; the law should also address fouling in the sea from oil discharge as prohibited by the UK Law and to have a provision for non-compliance. Measures such as a fine or summary convictions can be introduced into the law and enforcement may be facilitated through effective regulations.

Chapter 5 further compared Nigerian environmental law to Norway’s Petroleum Act, 1996 and it is discovered that the Act is based on rule of strict liability. Offshore oil exploration activities are carried out in a way that would safeguard the environment, health and wellbeing of Norwegians. A careful examination of its provisions showed that no consideration of any fault with the exception and a reduced liability in certain situation such as natural disaster, an act of war or other circumstances that are beyond the control of the licensee. In addition, the issues of liability arising out of exploration and exploitation activities including compensation are appropriately dealt with by the national law as discussed under 7-3 which stated that the licensee is liable for pollution damage irrespective of any fault. It is also observed that the petroleum policy in Norway is the same as liability regime and that has contributed positively into the country's success. Comparing Norwegian's provision to Nigerian Oil in Navigable water Act, it is noted that the monetary fine for violation of environmental law in Nigeria is inadequate and the measures have rendered the law ineffective.[43] It is therefore suggested that Nigeria could follow Norway and emulate its good practice and make violation of its environmental law a punishable offence regardless off the cause. The fine of N2000 could be replaced with a tougher sanction such as revocation or suspension of the licence, heavy fine and perhaps imprisonment. The current measures are far from achieving their goals as highlighted in this research, the loopholes in Nigerian environmental laws have allowed the transnational corporations operating in the country to violate the regulations and manipulate the policy. Therefore, the government in Nigeria should ensure the provisions of the laws address issues of liability and meet international best standards as seen in Norway.

The findings so far have been meant to help in a better understanding of element of research question, the extent in which the principles of international environmental law have been utilised at a state level and whether developing countries have been able to overcome the pressure from the transnational corporations on the issue of environmental law. As it was found in chapter 5 that the lack of enforcement of environmental law was one of the most common problems facing the developing countries, and Nigeria in particular where the law failed to provide for strict liability for violation of environmental law. It was also shown that the lack of governmental initiative and commitment in curbing environmental problems arising out of

[43] The fine is N2000 by virtue of S. 6 of Oil In Navigable Water Act.

exploration activities has indicated that Nigerian government preferred economic growth over tackling environmental problems. It is not disputed that the economic development of Nigeria is dependent on the way the natural resources are managed. Therefore, the research has suggested that the government needs to show initiative and willingness to strike a balance between the country's economic growth and environmental needs by way of regulations and policies. In the same way, it was found that the lack of public awareness about environmental laws and policies is another major factor significantly affecting the implementation of environmental law. As pointed out in the thesis that the lack of awareness could lead to reckless environmental behaviour such as vandalism, pipeline sabotage, kidnapping of oil workers and a serious deterioration in the relationship between the transnational corporation, the host state and the host community could result in such event. Ultimately, the public need to be informed and people should be given access to relevant environmental information as doing so would create public awareness.

As seen above the 5 chapters of this thesis have addressed the stated aims of the research as well as the research questions raised. The researcher observed that there is a dearth of research work and literature focusing specifically on oil and gas contracts, and as a result, there are numerous gaps and challenges in the area of oil contracts, particularly on the negative impacts of such contracts on the host states. In an attempt to narrow this gap, the research analysed the dynamics of the legal and regulatory framework of the oil and gas industry and the ever changing contract types and nature, especially in developing countries. In achieving this goal of the research, three research questions were raised, namely: what is the current structure of oil contracts and to what extent can parties' commitment be altered to ensure the sustenance of economic stability? Which contract type is the best for development and financial purposes, and finally, what are the causes of imbalance in the oil contract and to what extent have the principles of international environmental law been utilised at a state level and whether developing countries have been able to overcome the pressures from transnational corporations on the issue of environmental law?

In resolving the issues raised, four types of oil and gas contracts[44] and the elements of these contracts with the way they are drafted and interpreted in different jurisdictions, as well as the issues that States struggle with in formulating contracting policies, were addressed, with specific focus in the Nigerian jurisdiction.

The researcher observed that international investment treaties have failed to regulate the activities of TNCs, and the review of literature in this thesis has indicated that the BITs are one sided, catering for only the investors' protection. Notwithstanding, this research revealed that host States have successfully challenged the conduct of TNCs through arbitration and/or Investment Treaty Arbitration. Furthermore, to ensure the sustenance of economic stability or maintain the interest of host States and the TNCs in any contract, BITs must strike a balance between the rights and responsibilities of TNCs. It is submitted that a substantial adherence to arbitration as a means of dispute resolution, and the striking of balance in the drafting of BITs to represent the rights of TNCs as well as their responsibilities to the host states, will constructively resolve major challenges in the area of oil contracts, particularly the mitigation of the negative impacts of such contracts on the host states, which is the primary aim of this research.

It is further concluded, having regard to the research questions raised in this thesis, that the Joint Venture (JV) model is one of the best, and that despite the financial burden it places on the host States, the JV makes the host States a responsible and direct participant in the extraction of natural resources. However, since this research is aimed at bridging the gaps in the nature of oil contracts that will addresses the challenges faced in host States, this research

[44] The concession contract, the joint venture contract, the service contract and the production sharing contract.

recommended the Production Sharing Agreement or Contract as the best, in that in PSA, host States retain full control of exploration activities in a manner that TNCs carry out exploration activities with the anticipation of getting paid by the host States.

It is observed that whilst it is suggested that arbitration clauses in oil contracts are more favourable for both TNCs and host States, it is pertinent to note that tax related issues within such contracts cannot form the subject matter of arbitration in Nigeria. In this vein, the Arbitration and Conciliation Act may be amended to accommodate tax related issues, and/or TNCs and host States may adopt Rules of other arbitral institutions as governing law.

It is concluded that the numerous and extant laws in the protection of the Nigerian environment should be reviewed and environmental activities should be carried out in a way that will safeguard the environment.

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